Supreme Court, U.S.
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APPENDICES VOLUME I OF III

(1a - 105a)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-70664

WILLIAM C. SARSFIELD

Petitioner,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

No. AA-EC-93-144

WILLIAM C. SARSFIELD

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

105PP

APPENDIX A

[Filed Jan. 2, 1997]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-70664

AA-EC-93-144

WILLIAM C. SARSFIELD, Former Chairman of the Board and Current Director of Sequoia National Bank,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

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[Filed Jan. 2, 1997]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 95-70664

AA-EC-93-144

WILLIAM C. SARSFIELD, Former Chairman of the Board and Current Director of Sequoia National Bank,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

MEMORANDUM*

Petition to Review a Decision of the United States Department of the Treasury

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Argued and Submitted: December 9, 1996

Decided: January 2, 1997

Before: FARRIS, BEEZER, and TASHIMA, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

MEMORANDUM

STANDARD OF REVIEW

An agency's findings of fact must be upheld if supported by substantial evidence in the record. Transcon Lines v. AT&T Technologies, Inc., 89 F.3d 559, 564 (9th Cir. 1996). Substantial evidence means more than a mere scintilla but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id.

Agency decisions may be set aside only if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Id. at 563.

DISCUSSION

Sarsfield was an executive officer and Chairman of the Board at Sequoia National Bank when the consent order was signed in March 1992. He did not relinquish his executive position until August 1992, at which point the Articles at issue had already been violated. He remained Chairman of the Board into January 1993. Sarsfield was an institution-affiliated party as an executive and as a director. As such, he was responsible for Sequoia's compliance with the consent order. His intent is inapposite. See 12 U.S.C. § 1818(i)(2)(A).

Sarsfield argues that, for a variety of reasons, the Comptroller's conclusion that seven Articles of the consent order had been violated was not supported by substantial evidence. We have carefully reviewed the record. Sarsfield's contentions are not

supportable. In particular, this record does not demonstrate 1) illicit collusion between the OCC and members of Sequoia's board; 2) that the OCC was unaware of the source of documents; 3) that the OCC waived compliance with any of the Articles; 4) that Sarsfield acted entirely in good faith to comply with the consent order; or 5) that bank management, not Sarsfield, was responsible for noncompliance. Further, Sarsfield recognizes, as he must, that some consent order Articles were not complied with in the time required.

The Comptroller's findings that Articles VI, VII, IX, X, XII, XIII, and XV of the consent order were violated, and the imposition of a $10,000 Civil Money Penalty for those violations, are supported by substantial evidence. The Comptroller's decisions were neither arbitrary nor capricious.

PETITION FOR REVIEW DENIED.

[Filed Feb. 28, 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 95-70664

AA-EC-93-144

WILLIAM S. SARSFIELD, Former Chairman of the Board and Current Director of Sequoia National Bank,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE TREASURY,

Respondent.

ORDER

Before: FARRIS BEEZER, and TASHIMA, Circuit Judges.

The Petition for rehearing of Petitioner Sarsfield, filed February 19, 1997, is DENIED.

APPENDIX B

[Filed Feb. 19, 1997]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C.A. No. 95-70664

OCC AA-EC-93-144

WILLIAM S. SARSFIELD, Former Chairman of the Board and Current Director of Sequoia National Bank,

Petitioner,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

PETITION FOR REHEARING OF MEMORANDUM OF PETITION TO REVIEW A DECISION OF THE UNITED STATES DEPARTMENT OF THE TREASURY [FRAP 40]

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Attorneys for Petitioner

William C. Sarsfield

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I. INTRODUCTION

This Petition for Rehearing is submitted pursuant to analysis and judgment by counsel for Petitioner that the Court's January 2, 1997, Memorandum denying the Petition to Review a Decision of the United States Department of the Treasury incorrectly analyzed and decided the case. (Appendix A.) In particular, this Petition for Rehearing is based on the existence of the following situation:

1. The decision overlooked material points of law; and
2. The decision overlooked material points of fact.

As an introductory matter, it is respectfully submitted that the complexity of the issues and the volume of the record raised by the Petition for Rehearing cannot be adequately addressed or decided with the one-paragraph analysis set forth in the Court's Memorandum filed and entered January 2, 1997. Moreover, even assuming for the sake of argument that the five sub-points enumerated in the Court's one-paragraph discussion were correct, that analysis does not address the two primary bases for the Petition, i.e., that the Office of the Comptroller of the Currency's ("the OCC") Final Decision and Order dated July 21, 1995, which completely rejected all of the findings in Petitioner's favor entered by Administrative Law Judge ("ALJ") Shipe in his Recommended Decision, was not supported by substantial evidence, and was arbitrary and capricious.

II. THE COURT'S MEMORANDUM OVERLOOKS MATERIAL POINTS OF LAW AND FACT.

There are three material points of law raised by Petitioner which this Court has apparently overlooked. These are:

1. Where the agency has "overruled" the ALJ's Recommended Decision, and where the disagreement between the agency and the ALJ involve questions of fact and credibility, less deference is accorded the agency's determination and a reviewing court is required to examine the evidence more critically in determining whether there is substantial evidence to support that agency decision. (Blackburn v. Martin, 982 F. 2d 125, 128 (4th Cir. 1992).) Judge Shipe found no violations of Articles X and XV. Moreover, he found only "technical" violations of Articles VI, VII, IX, XII and XIII. Judge Shipe specifically found that Petitioner Sarsfield acted in "good faith" and that he "... sincerely wanted to do that which was in the best interest of the Bank." Under the Blackburn opinion, this Court is required to examine more critically (and give less deference to the OCC) the evidence with respect to these Articles and Judge Shipe's findings on them. Petitioner respectfully submits that he is entitled to a detailed analysis by this Court of exactly what "substantial evidence" exists to warrant the OCC's complete rejection of the ALJ's determinations after hearing the witnesses and evaluating their credibility.[1] Petitioner

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[1] While Petitioner must of course concede that under the statutory scheme operative herein, the OCC has the "right" to ignore and overrule

respectfully submits that, when such an analysis is done, it must be concluded that at a minimum the findings of the ALJ in his Recommended Decision (ER 52) should be reinstated.

2. Substantiality of the evidence must take into account whatever in the record detracts from its weight. (Nibali v. United States, 589 F. 2d 514, 516 (Ct. Claims 1978); Blackburn v. Martin 982 F. 2d 125, 128 (4th Cir. 1992).) This point of law is particularly critical to this case, since the OCC's decision is based almost entirely on the "statements" of Henning and Bolles. In his Reply Brief, Petitioner pointed out that the Excerpts of Record submitted by the OCC in support of the ROB relied heavily on draft "meeting notes" (i.e., statements) of Henning and/or Bolles. See Petitioner's Reply Brief at page 4, line 2 *et seq*. This is absolutely critical in determining the "substantiality" of the evidence supporting the

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the ALJ's determinations, Petitioner respectfully submits that notions of due process must also mandate a very strong burden on the agency if it elects to "overrule" the ALJ. Here, the ALJ heard four days of evidence, including the critical testimony of the OCC witnesses (examiners Sander and Ragus as well as former Bank Board members Henning and Bolles). As will be seen below, the OCC takes entirely inconsistent positions with respect to the credibility of Henning/Bolles and the weight to be given their "statements," on the one hand, contending that their "statements" cannot be relied upon to support Petitioner's arguments, while at the same time basing its entire case on the "statements" of Henning and Bolles (both in the form of their testimony and their numerous "reports" which form the exclusive basis for the OCC's findings.

OCC's findings, because the OCC has itself argued that ". . . Henning's uncorroborated statements cannot be relied upon." (ER 55, page 19.) The OCC made this argument in attempting to diffuse the uncontroverted testimony by Henning in which he disclosed the OCC's admissions to him that the Consent Order of March 1992 was concocted by the OCC for the specific purpose of "getting rid of Sarsfield." Having judicially admitted that Henning's "statements" cannot be relied upon, the OCC cannot avoid the impact of this statement in light of the fact that OCC's entire case is itself premised almost exclusively on the "uncorroborated statements" of Henning. In other words, by admitting that Henning's "statements" are unreliable, the OCC is admitting that there is no substantial evidence supporting its own case.[2]

3. A finding counter to uncontroverted evidence is not supported by substantial evidence. (Evans v. Heckler, 734 F. 2d

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[2] It is also worthy of note that all of the written "reports" of Henning were erroneously admitted into evidence. Although Petitioner objected to them as hearsay at the June 1994 trial, they were admitted over these objections, presumably based on the "business records" exception to hearsay rule. However, Henning's subsequent testimony at the trial in which he admitted that these "reports" were surreptitiously prepared (i.e., "forged") and submitted to the OCC without the knowledge of the Bank, rendered the "business records" hearsay exception inapplicable since the "reports" obviously were not prepared "in the regular course of business" as required for that exception.

1012, 1015 (4th Cir. 1984).) The evidence at trial was uncontroverted that Henning/Bolles embarked on a personal vendetta against Petitioner starting in 1991 and used the OCC with its extraordinary regulatory powers to accomplish their purpose of getting rid of Sarsfield. More importantly, Henning's testimony at the trial in which he related the OCC's frank admissions to him that the March 1992 Consent Order was concocted specifically for the purpose of getting rid of Sarsfield went uncontroverted. Under the holding of the Evans case, this evidence is conclusive on both the OCC and this Court and mandates a finding that the OCC has proceeded in an arbitrary and capricious manner as far back as March of 1992. Moreover, Henning's uncontroverted testimony at trial disclosing the surreptitious preparation and presentation to the OCC of "reports" which were not official documents of the Bank or the Compliance Committee is likewise binding on the OCC and this Court. As a result, given the fact that the OCC's case was premised almost entirely on these "reports," it is uncontroverted that there is no "substantial evidence" to support the OCC's case. The Court's Memorandum of January 2, 1997, entirely ignores this evidence and law. Petitioner is entitled to some discussion of these points and a justification for the Court's decision to ignore this evidence and law.

III. THE COURT'S DECISION OVERLOOKS OTHER MATERIAL EVIDENCE.

In its one-paragraph "discussion" of the issues, the Court enumerated five sub-points to support its decision that the OCC's

findings were "supported" by substantial evidence and that his decisions "were neither arbitrary nor capricious." Petitioner respectfully submits that none of these sub-points deal with the issues raised by Petitioner's Petition, nor do they address any of the evidence or the issue of "substantiality of that evidence." The following sets forth Petitioner's position with respect to the Court's five points in the same order enumerated in the Court's Memorandum.

1. The Court first observed that the record "does not demonstrate illicit collusion between the OCC and members of Sequoia's Board." This observation exhibits a misapprehension of Petitioner's argument with respect to the relationship between the OCC and the Henning/Bolles faction. It is not Petitioner's position that the OCC intentionally engaged in "illicit collusion" with Henning and Bolles, at least prior to the June 1994 trial. Instead, as Petitioner's Opening Brief argued, the OCC was duped into allowing itself to be used by Henning/Bolles to advance their own personal vendetta against Sarsfield. As mentioned repeatedly throughout these proceedings, the evidence is uncontroverted that the OCC's primary purpose for the March 1992 Consent Order was to get rid of Sarsfield, which was of course the objective of Henning/Bolles all along. Because the OCC was unaware that the Henning/Bolles "reports" were all false documents surreptitiously prepared and submitted by Henning without the knowledge of the Bank, the OCC was unwittingly misled into believing that Sarsfield was actually doing all of the various things alleged by Henning and therefore used the March 1992 Consent Order and their extraordinary powers to

find violations (no matter how hyper-technical) of that Order to force Sarsfield out of the Bank. Again, it is critical to recognize that the evidence of Henning's false "reports" as well as the OCC's real purpose for the March 1992 Consent Order is uncontroverted.

With respect to Petitioner's "illicit collusion" argument, that is premised on the OCC's conduct starting with the June 1994 trial, at which Henning revealed for the first time that all of his "reports" to the OCC were in fact surreptitious forgeries and a fraud on the OCC. At this juncture, rather than re-evaluating their case and recognizing the possibility that they had been misled by Henning, the OCC stubbornly plowed ahead with its regulatory juggernaut and completely rejected the findings of the ALJ which were favorable to Sarsfield. Having done so, Petitioner respectfully submits that the OCC's conduct is improper, whether it is characterized as "illicit collusion" or something else.

The Court's Memorandum completely overlooks and fails to discuss the impact of Henning's testimony re the OCC's admissions of the real purpose of the March 1992 Consent Order. The Court also fails to address Henning's frank admissions of the fraudulent nature of the "reports" that he surreptitiously sent to the OCC, and the inescapable fact that the OCC's "findings" cite almost exclusively these Henning "reports" as evidentiary support. This is especially critical since the OCC has admitted that "Henning cannot be relied upon." (ER 55, page 19.)

2. The Court found that the "record does not demonstrate

that the OCC was unaware of the source of documents." This observation is partially correct and partially incorrect. It is incorrect insofar as OCC examiners Sander and Ragus both admitted that certain of their key determinations as to noncompliance were based upon reliance on documents which they were forced to admit at trial were in fact unreliable evidence. In particular, Sander admitted that his findings of noncompliance of Articles VI and VII were "flawed" when it was demonstrated to him at the June 1994 trial that he had relied upon an outdated 1986 "Asset and Liability Management Policy." (See Petitioner's Opening Brief at pages 13 and 14.) Moreover, Mr. Sander relied on a "report" prepared by Bolles in March of 1993. At trial, he admitted that he should have (but failed to) taken into account the fact that this so-called "report" was not an official Bank document, but one generated by a disgruntled and voted-out-of-office member of the minority faction of the Board. (See Petitioner's Opening Brief at page 14, first full paragraph.)

This evidence conclusively demonstrated that in fact the OCC had been completely unaware of the source and unreliability of several critical documents upon which they had premised their conclusions of noncompliance. Moreover, at trial, examiners Sander and Ragus both admitted that their reliance upon these documents rendered many of their conclusions "flawed" and in need of further examination.

The Court's observation No. 2 is also incorrect with respect to the fraudulent Henning "reports." The fraudulent nature of these reports was unknown to everyone until Henning testified at the June

1994 trial. In his Reply Brief (at page 4), Petitioner pointed out that the OCC's findings relied almost entirely on these fraudulent "reports," in particular, ER 69, 70, 71, 73, 74, 76, 77, 78, 79, 84, 85, 100, 101. (See also ER 22, 23, 25, 26 and 27 which are Henning/Bolles' "reports" introduced into evidence by the OCC.) While Petitioner respectfully submits that the Court's observation that the record did not demonstrate the OCC was unaware of the fraudulent nature of these "reports" is incorrect, the Court's opposite conclusion actually supports Petitioner, not the OCC. If in fact the OCC was actually aware that these "reports" by Henning were fraudulent, submitted surreptitiously and without knowledge of the Bank, and for the purpose of advancing Henning's own personal vendetta against Sarsfield, that would conclusively demonstrate illicit collusion between the OCC and Henning. No more clear case of such collusion can be imagined.

3. The Court further observed that "no evidence existed that the OCC waived compliance with any of the Articles." Petitioner respectfully submits that this observation overlooks the evidence and arguments presented in Petitioner's Opening Brief at page 16 with respect to Article IX. Moreover, Petitioner's argument is not that the OCC "waived" compliance with Article IX. Rather, Petitioner's arguments and the evidence in support thereof demonstrate clearly that the OCC had agreed to a "prioritization" of loan policy revisions. This prioritization allowed the Bank to defer revision of its loan policy manual to the latter part of 1992. Although Petitioner conceives that these loan policy revisions were not accomplished by December 31, 1992, Petitioner also respectfully

submits (and the evidence is uncontroverted) that he was no longer responsible as management for compliance issues after his resignation in August of 1992. Indeed, both examiners Sander and Ragus admitted as much at trial.

4. The Court further observed that "The record does not demonstrate that Sarsfield acted entirely in good faith to Comply with the consent order."

Petitioner respectfully submits that this naked "observation" without more analysis is a denial of due process. If this Court wishes to make such a finding, Petitioner is entitled to (1) an analysis of why the ALJ's (Judge Shipe) observations to the contrary should be rejected, as well as (2) a recitation as to what evidence exists to show any lack of "good faith" by Petitioner Sarsfield.

5. The court's final observation was that "The record does not demonstrate that Bank management, not Sarsfield, was responsible for noncompliance."

This observation again exhibits a misapprehension by the Court, of Petitioner's arguments. With the exception of compliance with Article IX, after August of 1992 (i.e., the "prioritization" issue), Sarsfield has never contended that "Bank management," rather than the Board and himself, was responsible for compliance.

Finally, the Court's observation that Sarsfield ". . . did not relinquish his executive position until August 1992, at which point

the Articles at issue had already been violated" is flawed, circular logic. In the first place, Petitioner, of course, contends and believes that the evidence shows that there were no instances of noncompliance as of August 1992. The ALJ agreed, at least with respect to Articles X and XV. Moreover, each of the seven Articles in question present very different issues regarding timing for compliance and when compliance could, much less was required to, be accomplished. Such a broad statement by the Court simply ignores the bulk of the evidence in this case.

IV. CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests rehearing on all of these issues.

DATED: February 18, 1997

Respectfully submitted,

CAPPELLO & McCANN LLP

/s/ _____

Michael W. McCann
Attorneys for Petitioner
William C. Sarsfield

Statement of Related Cases

Pursuant to Rule 28-2.6 of the Rules of the US. Court of Appeals, 9th Circuit, the undersigned, counsel of record for Petitioner, William C. Sarsfield, certifies that there are no known "related cases" (as that term is defined in Rule 28-2.6) pending before this Court.

DATED: February 18, 1997.

CAPPELLO & McCANN LLP

/s/_____

Michael W. McCann
Attorneys for Petitioner
William C. Sarsfield

[Filed Apr. 24, 1996]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Case No. 95-70664

OCC AA-ED-93-144

WILLIAM S. SARSFIELD, Former Chairman of the Board and Current Director of Sequoia National Bank,

Petitioner,

v.

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF ABBREVIATIONS

Within Petitioner's Reply Brief the following reference abbreviations are used:

"ER" Refers to the "Petitioner's Excerpt of Record" served and filed herewith, and provides citations throughout the "...Brief," to items contained in Petitioners Excerpt of Record."

"AR" Refers to the "Administrative Record" prepared by the Office of the Comptroller of the Currency. This is a secondary citation used to provide parallel reference to items in the "Petitioner's Excerpt of Record" which are also contained in the "Administrative Record."

"WS" Refers to items of evidence offered by the Petitioner, William C. Sarsfield, at the underlying trial of this matter before the Honorable Arthur J. Shipe. This is a supplemental citation used to provide parallel reference to items in the "Petitioner's Excerpt of Record" which are also contained in the Administrative Record."

"OCC" Refers to items of evidence offered by the Respondent, Office of the Comp-troller of the Currency, at the underlying trial of this matter before the Honorable Arthur J. Shipe. This is a supplemental citation used to provide parallel reference to items in the "Petitioner's Excerpt of Record" which are also contained in the Administrative Record."

"POB" Refers to Petitioner William C. Sarsfield's Opening Brief.

"ROB" Refers to Respondent OCC's Opposition Brief.

I.

INTRODUCTION

Respondent OCC's Opposition Brief (hereinafter cited as "ROB") suffers from the same lack of competent evidentiary support that occurred at the trial of this matter. While not every misstatement of fact can be corrected in the 20-page limit imposed for this brief, Petitioner will demonstrate below that all of the significant "facts" cited by the OCC in their brief lack evidentiary support. In each instance, the evidence cited by the OCC in support of their alleged "facts", either does not establish the fact, or is merely a cite to the OCC's own self-serving findings of fact and conclusions of law (ER 52, beginning at p. 20.) which themselves were unsupported by competent evidence other than citations to unsupported accusations in forged documents surreptitiously created by Henning and Bolles and submitted to the OCC which the OCC subsequently relied upon without question or investigation.

II.

RESPONSE TO OCC'S "COUNTER STATEMENT OF THE FACTS"

The following is a listing of some of the more significant misstatements of fact, followed by the correct statement:

A. The OCC contends that "Sequoia has had a troubled history." (ROB, p. 2.) Other than the OCC's own unsubstantiated statement to this effect, there is no proof in the record. In fact, the only time Sequoia has had any "trouble" was in 1992 when it

suffered the first two loan losses in its history. Much like the proverbial ostrich with its head in the sand, the OCC continues to contend that the Bank has been poorly managed and operated over the years, notwithstanding the fact that its own bank examiners acknowledged at the trial in this matter that Sequoia's loan loss history was uniquely excellent.[1]

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[1] In fact, the only "trouble" Sequoia Bank has experienced during its years of operations is the direct result of the unfortunate collaboration between the OCC and the Henning/Bolles minority faction of the Bank's board. That collaboration, and the OCC's participation therein, led to the filing of a shareholder derivative suit against the Bank's Board of Directors in 1993 (Laurence v. Sarsfield, et al., San Francisco Superior Court Case No. 950665). Other than the distractions and legal costs associated with dealing with the OCC and this shareholder derivative suit, Sequoia Bank continues to operate successfully to this day. This Court is requested to take judicial notice of the "Opinion and Order Following Trial" issued by Judge Warren in the share- holder derivative case on February 22, 1996 terminating that action. (attached hereto as ER 107.) In his opinion, Judge Warren found the report of the Bank's Special Litigation Committee was independent and objective and correct in its analysis that the Bank's loan portfolio had been properly underwritten and administered, that its liquidity, capital and reserves had all been properly handled, and that none of the allegations made by the shareholder plaintiff (which were virtual verbatim repeats of the charges made by the OCC herein) caused any damage to the Bank. (ER 107, pp. 15-20.)

B. "Between June and December 1992, Sequoia's Board split into two factions. Petitioner was a member of the majority faction, which could always outvote the minority faction." (ROB, p.2)

The Henning/Bolles minority faction already existed long prior to June 1992 and had already been collaborating with the OCC for several months in support of its vendetta against Petitioner. While, of course, any majority can outvote a minority, the OCC's simplistic logic that Henning/Bolles could not have obstructed the Bank's compliance with the consent order is unsupported by fact as well as the OCC's own admission to the contrary. (ER 41, pp. 10-11) the OCC's argument ignores the fact that Henning and Bolles occupied two out of three of the seats on the Compliance Committee which was responsible for the Bank's compliance with the Consent Order and, therefore, were able to control that process and, more importantly, they were able to manipulate and mislead the OCC into adopting the Henning/Bolles view of that process.

C. "Petitioner obstructed compliance with the Order." (ROB, p. 4). The only "evidence" cited by the OCC is its own purported "finding of fact" (which the ALJ rejected) and a memo of a purported "Compliance Committee" meeting at which Henning and Bolles were the only attendees. It is difficult to justify the OCC continuing to make this unfounded accusation when both OCC examiners (Sander and Regis) testified to the contrary, and the ALJ found to the contrary.

D. Similarly, the OCC contends that Petitioner "ignored the OCC," opposed efforts by other Board members to comply, and advised the Bank's president not to charge off a certain loan. (ROB, P. 4.) Again, the only cited evidence is the OCC's own purported "findings" and a memorandum written by Henning/Bolles regarding a secret meeting they had with the OCC in December of 1992. The testimony of the OCC's own examiners was again directly contrary to the position now taken by the OCC.

E. The OCC denies that it held the settlement agreement over Henning's head until after he testified, claiming that the Henning/Bolles "settlement agreements" were executed before they testified. (ROB, p. 5.) It is astounding that the OCC continues to make this assertion in light of Henning's direct and clear admission at trial that he was "praying" that the OCC "go-along with" his request that they settle for a payment below one thousand dollars ($1,000). (ER 47, pp. 805-806.) It is obvious from this testimony that at the very moment he was testifying, Henning was awaiting word from the OCC that it had agreed to his requested terms for settlement. It was not until one week <u>after</u> the trial that the OCC actually <u>approved</u> the settlements. (ER 48, Exh. A.) Instead of conceding these obvious facts demonstrating the ongoing sordid relationship with the Henning/Bolles faction, the OCC disingenuously states that the "... Henning and Bolles settlement agreements were executed before they testified ..." (ROB, p. 5.) Not surprisingly, the OCC can cite to no evidentiary support for this subterfuge. As the OCC's letter to the ALJ on June 16, 1994 (one week after the trial) admits, these settlement agreements were not

"approved by the agency" (which is a condition to their effectiveness) until after Henning/Bolles testified.

F. The OCC continues to deny the clear and uncontradicted evidence of its collusion with Henning/Bolles against Petitioner, claiming that "... Petitioner relied on hearsay to establish the collusion's existence ... This hearsay went uncorroborated." (ROB, p. 5.) The purported "hearsay" referenced by the OCC was Henning's revelation that in August of 1992, the OCC had conceded to Henning/Bolles that the real purpose behind the Consent Order was to force Mr. Sarsfield out of the Bank. The OCC's belated characterization of this evidence as "hearsay" is, of course, unavailing since no objection was made to this testimony at trial. Moreover, if such an objection had been made, it certainly would have been overruled pursuant to the admission against interest exception to the hearsay rule. While the OCC complains that this evidence was "uncorroborated", the OCC still offers no explanation as to why it never produced any witness willing to deny under oath the accuracy of Henning's sworn testimony.

Finally, the OCC itself admits that "... Henning's uncorroborated statements cannot be relied upon." (ER 55, p. 19.) This frank admission by itself entirely guts the OCC's case, since the OCC itself relied heavily upon the "statements" of Henning contained in the numerous forged documents submitted by Henning/Bolles to the OCC which contained the reckless and unsupported accusations against Petitioner that the OCC subsequently plagiarized verbatim into its pleadings in this case. While the OCC has been furiously back-

pedaling since the June 1994 trial in an attempt to now distance itself from the Henning/Bolles faction, the record in this case speaks otherwise. For example, the Excerpts of Record submitted by the OCC in support of the ROB demonstrates heavy reliance on draft "meeting notes" prepared by Henning and/or Bolles. (See ER 69, 70, 71, 73, 74, 76, 77, 78, 79, 84, 85, 100 and 101.) See also ER 22, 23, 25, 26 and 27 which are Henning/Bolles' "reports" introduced into evidence by the OCC. Without exception, each one of these "reports" is nothing more than a self-serving, unsubstantiated and reckless attack on Petitioner by Henning/Bolles which the OCC incorporated verbatim without question into its own findings and conclusions. In fact, at the recent trial (and dismissal) of the shareholder derivative action, Henning candidly admitted that:

> "... I had gone into this with a lot of bitterness and bias, I admit that, and a siege mentality. I will be very frank about that ... There were these tremendous splits and personal animosities [among the parties] that this court can never appreciate which in many ways were juvenile." (ER 107, p. 1-2.)

Judge Warren clearly recognized that the allegations of the plaintiff shareholder (which, were simply a regurgitation of the OCC's allegations in this case) were premised entirely upon this unfortunate "siege mentality" and "bitterness and bias" which permeated and fatally infected all of the Henning/Bolles "reports" and testimony upon which the OCC primarily relies to prove its case.

G. The OCC continues to assert that "... Petitioner maintain the dominant position ..." on the Board "... during the relevant period." (ROB, p. 6.)

Again, this astounding misrepresentation of fact is exemplary of the regulatory excess and prosecutorial misconduct that permeates the entire OCC case. In the first place, immediately prior to this misrepresentation, the OCC states that "... in arriving at his decision, the Comptroller did not rely upon the testimony of, or evidence generated by, Henning or Bolles. (ROB, bottom of p. 5.) Yet, in arguing that Petitioner was "a dominant figure" in the next sentence, the OCC cites as its supporting evidence a Bolles memorandum (ER 84), the testimony of Henning (ER 106), another Bolles memorandum (ER 101)[2], and a Henning/Bolles "Compliance Committee Meeting" memo. (ER 79) So much for the OCC's assertion that it does not premise its entire case on "evidence" generated by Henning/Bolles. Moreover, the OCC's brief is directly contradicted by the testimony of its own examiners that they were not dealing with Petitioner on compliance issues after August of 1992, that Petitioner was "no longer involved in management after August 1992" and that Petitioner was not "involved with ... Compliance With the Consent Order" after that period." (POB, p. 5.)

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[2]This is the infamous purported "Response to Report of Examination (dated December 31, 1992)" submitted and prepared by Bolles in May of 1993 after he had been voted off the Bank's Board, a fact of which the OCC examiners admitted at trial they were unaware and should have considered before relying upon the document.

III.
ARGUMENT

With respect to each of the Articles of the Consent Order at issue, the OCC does not deny or otherwise attempt to refute the evidence of compliance cited by Petitioner. Instead, the OCC again only recites its own unsupported conclusions (i.e., citations to ER 55) and to statements in Henning/Bolles documents which have been proven to be unreliable and which Henning subsequently recanted in the shareholder derivative suit. This tainted and unreliable "evidence" cannot meet the "substantial evidence" standard of review. In the interest of brevity, Petitioner will not again repeat citations to all of the evidence demonstrating compliance. Instead, this brief will focus on the lack of substantiality of the evidence the OCC cites to establish alleged noncompliance.

1. Article VI

The OCC cites three pieces of evidence in support of its argument that the Bank had not adopted a liquidity contingency plan — ER 21, ER 23 and ER 101. None of this evidence constitutes "substantial evidence" of noncompliance. The Catalano Report (ER 21, p. 2.) does not establish noncompliance. The one statement relied upon ("... the Bank should develop a contingency plan to be in place while the restructuring is being conducted") has been taken completely out of context. That isolated statement referred to the anticipated need to make additional revisions to the liquidity contingency plan if and when the Bank

implemented a "restructuring" of its fund management policy that Catalano was recommending. This innocuous sentence has nothing to do with and in no way obviates the plain evidence that a liquidity contingency plan was already in place and was carried out in a timely fashion sufficient to meet the 1993 maturation of certain large CD's. The OCC cannot cite a single statement by Catalano that the Bank's liquidity contingency plan was not sufficient to meet these needs. ER 23 is another Bolles "memorandum", this time containing double hearsay. Moreover, this self-serving statement by Bolles ignores all the evidence cited by Petitioner showing that the liquidity contingency plan was in place and implemented in the timely manner. Finally, ER 101 is the Bolles "report" dated May 28, 1993 and prepared by Bolles after he had already been kicked off the Bank's Board and five months after the date of alleged noncompliance. In addition to its unreliability, this report was plainly false and fraudulent in its assertion that "no liquidity contingency plan has been prepared." As Petitioner's undisputed evidence established, not only had such a plan been "prepared", it had already been implemented to meet the liquidity demands arising from the maturation of large CD's in March and April of 1993.

The OCC apparently finally recognized the infirmity of its position when, in its conclusion on Article VI, it admitted that as part of its liquidity contingency plan, the Bank had adopted and implemented a plan to sell loans prior to the early 1993 maturation of large CD's. Recognizing that this uncontroverted evidence destroyed its arguments of noncompliance, the OCC adopted the incredible fall-back position that this facet of the liquidity

contingency plan (i.e., loan sales) only demonstrates compliance with subsection 1 of Article VI, but not section 4. This is absurd — sale of assets to generate cash to meet anticipated maturation of large CD's is classic liquidity contingency management policy. The OCC's belated admission and disingenuous attempt to explain it away with a slight-of-hand argument is demonstrative of the fundamental lack or merit underlying the OCC's entire case from inception through to the present.

2. **Article VII**

The OCC concedes that the Bank "reduced the total number of dollars of volatile liabilities." As a fall-back, the OCC claims that the Bank "failed to develop alternative funding sources" and did not reduce volatile liabilities as a "percentage of overall deposits. This argument is premised on a logical absurdity. First, any reduction in volatile liabilities automatically results in a decrease of that component of "overall deposits" on a percentage basis. For example, if volatile liabilities represent $20 million out of the Bank's $100 million deposit base, a reduction of volatile liabilities to $10 million yields both a reduction in total dollars as well as a percentage reduction (20 percent vs. 11 percent). The OCC's mathematical theory is simply incorrect. Moreover, while the Bank developed and implemented plans to increase "core deposits," it was unfortunately unable to significantly increase that deposit base in the eight months prior to December 31, 1992. The Bank had historically relied upon volatile liabilities for 6 years prior to 1992. Unfortunately, when the OCC changed its policy in this regard in

1992, despite its best efforts to do so, the Bank was unable to increase core deposits in the short time frame allowed by the OCC. Such precipitous and arbitrary conduct by the OCC cannot form the basis for quasi criminal civil money penalties.

Finally, while admitting that the testimony of Examiner Sander was flawed due to his reliance upon outdated policy documents and his lack of knowledge of the Bank's loan sales, the OCC persists in claiming that Sanders' testimony must be "given deference." While this is a true policy statement in the abstract, such deference is not appropriate when it is demonstrated (indeed Sanders admitted on cross-examination) that the examiner's testimony is, in fact, seriously flawed in its foundation. In its ROB, the OCC repeats Sanders' errors by arguing that the Bank "sold loans totaling just $600,000", not the $5,000,000 in loans targeted for sale. (ROB, p. 15.) However, the evidence cited by the OCC shows that the $600,000 in sales was only as of May of 1992. The balance of the $5 million were sold in accordance with the Bank's plan to meet liquidity needs caused by maturation of large CD's in March/April of 1993. In an apparent attempt at a smokescreen, the OCC references ER 88 regarding a purported plan to sell "$11 million in home equity loans." (ROB, p. 15, fn 15.) ER 88 is an undated, unsigned document which the OCC identifies as "probably part of December 31, 1992 report of examination." (OCC excerpts of record, Vol. I, index.) This is hardly reliable evidence that would qualify as "substantial evidence" of noncompliance by the Bank.

3. **Article IX**

The OCC fails to rebut the clear and uncontroverted evidence of its initial acceptance of the adequacy of the Bank's loan policies in the first half of 1992 and its later acquiescence in the Bank's decision to prioritize final revisions to that loan policy until January of 1993 prior to resuming any lending activities. The OCC asserts that "... a review of Mr. Sanders' letter indicates that he did not approve the Bank's revised policy." (ROB, p. 16.) However, Mr. Sanders' letter (ER 8 and ER 63) states unequivocally that "... your letter appears to address our concerns regarding the adequacy of the loan policy ..." Again, recognizing the infirmity of its case, the OCC falls back on a purported "concession" by Petitioner in a 1995 pleading of lack of compliance with Article IX. Of course such a purported "concession" could not have formulated any part of the OCC's findings of noncompliance back in 1993. Moreover, such a "concession" never occurred — the OCC merely misconstrues and misreads Petitioner's arguments in ER 53 at page 11.

The OCC's position on Article IX is a classic example of hairsplitting and semantic nit-picking. The evidence is quite clear and entirely unrefuted that the OCC acknowledged the Bank's effective compliance with this article through June of 1992 and thereafter agreed with the Bank's prioritization of final revisions of its loan policy until January of 1993.

4. **Article X**

Petitioner submits this issue on his Opening Brief and the Recommended Decision of the ALJ (ER 52, pp. 11-13.)

5. **Article XII**

Again recognizing the infirmity of its position, the OCC for the first time falls back on the simplistic argument that because the Bank's reserves were at $650,000 in June of 1992 and because the two loan losses experienced by the Bank in December of 1992 (the only two loan losses in the Bank's history) totaled $692,000, the Bank's reserve calculation methodology therefore must be flawed. (ROB, p. 21.) This argument ignores the fact that, employing that very same methodology, the Bank increased its reserves after June of 1992 and before December of 1992 to a level that far exceeded the subsequent losses. (POB, p. 19, fn 5.) The OCC also now complains, for the first time, that the Bank did not develop an ALLL methodology "consistent with banking circular no. 201 and section 217 of the Comptroller's Handbook, etc." (ROB, p. 20-21) This argument ignores the fact that those publications employed ALLL calculation methodology premised principally upon utilizing a bank's prior history of loan losses as the cornerstone for the calculation. Again, because Sequoia Bank's prior six years of loan origination and administration was so efficient, the Bank had never experienced any loan losses prior to 1992. Given that fact, the OCC's blind insistence that the Bank utilize irrelevant policy publications again is demonstrative of the extent to which the regulatory function miscarried in this case.

6. Article XIII

The issue with respect to Article XIII is relatively simple. The evidence is uncontroverted that the Bank could not legally obtain updated financial information from real estate loans that were current on their payments, that the OCC had agreed that literal compliance with Article XIII was not required, and that only a "reasonable effort" to obtain updated information from problem loans was required. Petitioner made just such a "reasonable effort", obtaining updated information from some borrowers but not in cases that would jeopardize collection of the loans. This was a subjective and reasonable determination made by Petitioner (and one which, of course, turned out to be correct as all of these loans were collected). In essence, the OCC's case with respect to Article XIII rests on the premise that Petitioner should instead have acted unreasonably by jeopardizing the Bank's loan collection efforts and exposing it to potential lender liability claims by requesting financial information that borrowers could use to imply a commitment to renew the loan. Imposition of a quasi criminal civil money penalty under these circumstance is the ultimate "catch 22" elevation of form over substance and is arbitrary and capricious.

7. Article XV

Petitioner submits this issue on the arguments submitted in his opening brief.

IV.

CONCLUSION

In Sum, the OCC's Reply Brief substantiates and reaffirms what Petitioner has been saying all along, to wit:

1. The OCC failed to introduce any substantial evidence to prove noncompliance with any of the articles in question. Without exception, in support of each of its "findings" of noncompliance, the OCC cited as its only evidentiary support either one of the thoroughly discredited Henning/Bolles "reports" which in most instances were forged and fraudulent documents which purported to be Compliance Committee reports but, in fact, were surreptitiously prepared and submitted to the OCC. In some instances, the OCC also cited as evidentiary support its own reports of examination and other internally prepared documents, all of which themselves were premised entirely upon the same Henning/Bolles forgeries. The OCC's blind reliance upon these forged documents without question or independent investigation was explained by the startling revelation at trial that the OCC had been "in bed with" the Henning/Bolles faction since early 1991 in an effort to force Petitioner out of the Bank's management and that the Consent Order was imposed upon the Bank with the predetermined intent to ultimately find the Bank in noncompliance and force Petitioner out of day-to-day involvement in bank operations.

2. When the wild accusations and allegations in the Henning/Bolles "reports" are removed from the case, the OCC'S

purported "findings" of noncompliance stand naked of any evidentiary support. Moreover, in most instances, Petitioner demonstrated through cross-examination of the OCC examiners that the Bank was, in fact, in substantial compliance with each of the articles in question. By contrast, the OCC's assertions of noncompliance with each of the articles was in each instance hypertechnical and little more than highly subjective semantic nit picking.

3. Petitioner at all times acted in the utmost good faith and made Herculean efforts to see that the Bank was in compliance with the Article of the Consent Order until he was forced out of the Bank in August of 1992 by the OCC conspiracy with the Henning/Bolles faction.

Petitioner respectfully submits that the findings of the ALJ of his good faith and of the Bank's compliance with Articles X and XV should be affirmed, and the final decision of the OCC of noncompliance with Articles VI, VII, IX, XII and XIII should be vacated.

DATED: April 23, 1996. Respectfully submitted,

/s/ Michael W. McCann
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Attorneys for Petitioner
William C. Sarsfield

[Filed Jul. 26, 1995]

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

AA-EC-93-144

IN THE MATTER OF
WILLIAM C. SARSFIELD, FORMER CHAIRMAN AND
CURRENT DIRECTOR,
SEQUOIA NATIONAL BANK SAN FRANCISCO, CALIFORNIA

DECISION AND ORDER

I. Summary

This is a civil money penalty proceeding against Respondent alleging non-compliance with a Consent Cease and Desist Order. Upon consideration of the entire record, the Comptroller orders Respondent to pay a civil money penalty in the amount of $10,000.

II. Procedural Background

On November 20, 1993, the Office of the Comptroller of the Currency ("OCC") issued a Notice of Assessment of Civil Money Penalties ("Notice") against each member of the Board of Directors ("Board") of Sequoia National Bank, San Francisco, CA ("Sequoia"), alleging noncompliance with a Consent Cease and Desist Order ("Order") dated March 4, 1992. The Notice assessed a civil money penalty ("CMP") for $15,000 against William C. Sarsfield

("Respondent"). Respondent filed an Answer, and requested an administrative hearing pursuant to 12 U.S.C. § 1818(h)(1) and the OCC's Rules of Practice and Procedure, 12 C.F.R. Part 19. On June 7-10, 1994, a hearing was held before Administrative Law Judge Arthur L. Shipe ("ALJ"). OCC was represented by Enforcement Counsel and Respondent by private counsel. On February 3, 1995, the ALJ issued his Recommended Decision ("RD"), in which he recommended a $10,000 CMP. Pursuant to OCC Rules of Practice and Procedure, 12 C.F.R. § 19.39, both Respondent and Enforcement Counsel filed exceptions, and the case was submitted to the Comptroller on March 14, 1995.

III. The Comptroller's Decision

A. Background

When Sequoia was examined as of July 31, 1991, the OCC's examiners found significant deterioration in the bank's overall condition. Because Sequoia's overall condition was determined to be unsatisfactory, the bank was assigned a composite CAMEL rating of 4. RD at 29; Finding of Fact ("FF") 49.[1] Sequoia and the

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[1] "CAMEL" is an acronym for Capital, Asset Quality, Management, Earnings, and Liquidity. CAMEL ratings range from "1" to "5," with "1" being the best rating an institution can receive and "5" the worst. The Uniform Financial Institution Rating System ("UFIRS") is a rating system recommended by the Federal Financial Institutions Examination Council to provide a general framework for evaluating and assimilating all significant financial, operational and compliance factors in order to assign a summary or composite supervisory rating to each federally regulated commercial bank, savings and loan association, mutual

OCC then entered into the March 4, 1992 Order, which document Respondent reviewed and signed. RD at 30; FF 52, 54. The Order required Sequoia's Board of Directors ("Board"), which included Respondent, to:

1) develop plans to maintain adequate liquidity levels (Article VI);
2) reduce reliance on volatile funding sources (Article VII);
3) revise Sequoia's written loan policies (Article IX);
4) develop an adequate loan review program (Article X);
5) develop a program for maintaining an adequate reserve for loan losses (Article XII);
6) maintain up-to-date credit information on borrowers (Article XIII); and
7) maintain Sequoia's Tier 1 capital at eight percent (8%) (Article XV).

Order at 9-16, 19-21, 22.

OCC examiners next reviewed Sequoia as of June 30, 1992. At that examination, examiners concluded that Sequoia was not in compliance with several Articles of the Order, including Articles VI, VII, X, XII, and XIII, and was only partially in compliance with Article IX. OCC Exhibit 12 at A15-A18. At a subsequent OCC

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savings bank and credit union. The purpose of the rating system is to reflect in a comprehensive and uniform fashion an institution's financial condition. compliance with laws and regulations, and overall operating soundness. Use of the UFIRS was approved by the OCC in 1979. (See, OCC Examining Circular EC-159 (REV), dated December 10, 1979.)

examination of Sequoia, conducted as of December 31, 1992, the examiners concluded that Sequoia was not in compliance with Articles VI, VII, IX, X, XII, XIII, and XV. OCC Exhibit 43 at 14-17. Therefore, the OCC issued the Notice.

The ALJ elected to consider Articles VI and VII, both pertaining to liquidity, as a single requirement, thereby reducing to six the total instances of noncompliance he could find. The ALJ concluded that Enforcement Counsel had proved a violation of Articles VI, VII, IX, XII, XIII, but found that Respondent had not violated Articles X and XV. The ALJ recommended a CMP of $10,000. RD at 20, 84-85.

B. Respondent's Compliance with Order's Articles

1. Respondent Did Not Comply With Article VI

Background:

As part of Sequoia's obligations regarding maintenance of an adequate liquidity level, Article VI of the Order required that within 60 days the Board develop a liquidity contingency plan. Order at 10. Specifically, the liquidity contingency plan was to "... identify minimum and maximum liquidity needs and a course of action to meet those needs." Contingencies to be addressed included, but were not limited to: (a) earnings declines; (b) increases in nonperforming assets; (c) potential negative impact of adverse reports by industry analysts; (d) the volume of out-of-area and uninsured deposits; and (e) deposit concentrations. Order at 10-11. The ALJ concluded that Respondent had not complied with Article VI.

RD at 8, 50, 54-55, 57; Finding of Fact ("FF") 152, 173-74, 185.[2]

Respondent excepts to the ALJ's conclusion, arguing that if no contingency plan was put in place, then management, not the Board, is responsible. Moreover, Respondent claims that such a plan was in place not later than August, 1992. Respondent indicates that a consultant's contingency plan of October 30, 1992 was essentially the same plan that Respondent claimed was accepted by the Board some two months earlier. Respondent's Exceptions at 7.[3]

Discussion:

The Comptroller adopts the ALJ's conclusion. Despite Respondent's arguments to the contrary, as a member of Sequoia's Board, and as one who signed the Order, Respondent was obligated to obtain management compliance with the Order's terms, or to secure new management capable of doing so. Moreover, Respondent's claim that Sequoia's contingency plan already was in place by August 1992 is not supported by the record. On October 30, 1992, Sequoia's consultant indicated that "... a contingency plan should be prepared . . . ." OCC Exhibit 28 at 1. Her words clearly indicate that no plan was in place by that date. In fact, no such plan was in place through

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[2] Except as otherwise noted herein, the Comptroller adopts the findings of fact contained in the portion of the ALJ's Decision entitled "Findings of Fact." RD at 20-83; FF 1-312.

[3] Ms. Jeanine Catalano, an employee of the Secura Group, was hired by Sequoia in July, 1992 to provide an independent review of the Bank' s liquidity and volatile liability positions, and to make recommendations regarding same. 1 Transcript of Proceedings in the Matters of William C. Sarsfield ("Tr.") at 86-87.

December 31, 1992. 1 Tr. at 88.

2. Respondent Did Not Comply With Article VII

Background:

Article VII of the Order required the Board within 30 days to adopt and implement a plan, with specific time frames, to reduce the bank's reliance on volatile liabilities through the development of alternative funding sources. Order at 11. The ALJ concluded that despite Sequoia's submitting voluminous reports to the OCC from April 1992 through July 1992, Sequoia's response did not sufficiently specify Sequoia's intended plan, nor did the response adequately discuss the alternative funding sources that the Board would secure. RD at 9.

In his Exceptions, Respondent argues that he did, in fact, adequately respond to this requirement. Specifically, Respondent points out that in its initial response to the Order, Sequoia committed itself to reduce reliance on brokered funds by $2,563,000 by December 1992, and to hold the balance of funds subject to interest rate limits. Thereafter, Respondent notes that by August 31, 1992, Sequoia had reduced volatile liabilities by $4,947,000, nearly $2,400,000 above its target figure. Respondent's Exceptions at 10.

Discussion:

The Comptroller adopts the ALJ's conclusion that Respondent failed to comply with this requirement. The information that Sequoia submitted in response to this requirement failed to conclude how or from what source alternative funding sources would be developed. Also, the plan did not address how the bank would reduce its reliance on volatile liabilities, nor did the plan establish limitations on the use of volatile liabilities as a funding source. OCC Exhibit 12 at A-15.

Moreover, the Sequoia Board failed to address these matters more than 100 days after executing the Order.[4] Furthermore, while the Board reduced the total number of dollars of volatile liabilities on its balance sheets, the Board did not develop alternative funding sources so as to reduce Sequoia's reliance on volatile liabilities as a percentage of overall deposits. Simply, the Board reduced Sequoia's size, but not its relative reliance upon volatile funding sources.

3. Respondent Did Not Comply With Article IX

Background:

Article IX required that Sequoia, within 60 days of executing the Order, review and revise its loan policy. RD at 9-11, 57; FF 188. The ALJ found that Sequoia was not in compliance with Article IX's requirements through December 31, 1992. RD at 10-11, 58-61; FF 193-207. Respondent excepts to the ALJ's conclusion. Initially, Respondent concedes that the Board failed to comply with the requirements of Article IX through the June 30, 1992 examination.

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[4] Moreover, Sequoia had planned since August 1992 to sell $11 million in home equity loans so as to reduce the institution's reliance on volatile liabilities. However, this sale was not consummated by December 31, 1992 because the loan files needed extensive work to make them saleable. OCC Exhibit 45 (Undated, Unsigned OCC Memorandum Re: Sequoia's Liquidity) at 2. Thus, some nine months after the Order was executed obligating Respondent to reduce such reliance, and more than six months after a means was established to reduce such reliance, these loans had not been sold.

Respondent's Exceptions at 11. However, Respondent argues that after June 30, 1992, the OCC agreed that if the Board was to address other, more pressing concerns, the Board had to be permitted to defer revising its loan policy until these other issues had been attended to. Respondent's Exceptions at 11-12. Thus, Respondent appears to be arguing that if the Board failed to comply with the Order's requirement, more pressing matters mitigated this noncompliance. Moreover, Respondent argues that the OCC acquiesced with this noncompliance. Respondent's Exceptions at 11-12.

Discussion:

The Comptroller adopts the ALJ's conclusion that Respondent failed to comply with Article IX. Because Respondent conceded that the Board failed to comply with the requirements of Article IX through the June 30, 1992 examination, and because more than 60 days elapsed between the Order's March 4, 1992 execution date and June 30, 1992, Respondent admits Sequoia's failure to revise its loan policy as per Article IX's requirements.

In support of his position, Respondent claims that Mr. Victor I. Granholm's appointment as Sequoia's acting president in August 1992 precluded Granholm from completing the revision of Sequoia's loan policy. Respondent's Proposed Findings of Fact and Conclusions of Law ("Proposed Findings and Conclusions") at 13; OCC Exhibit 43 at 6-7. However, at the time of Granholm's appointment in August 1992, Sequoia was already in violation of Article IX's 60 day deadline for a new loan policy. Thus, Respondent's contention is without merit.

Moreover, Respondent claims that the OCC acquiesced with the Board's decision to defer the revising of Sequoia's loan policy. However, documentation cited by Respondent, Respondent's Exhibit

WS 11, provides no support for this argument. Accordingly, the Comptroller adopts the ALJ's conclusion that Respondent failed to produce an acceptable revised loan policy as required under Article IX. RD at 10-11; FF 193-207.

4. Respondent Did Not Comply With Article X

Background:

Article X required Sequoia to develop an adequate loan review program within 60 days. RD at 11, 61-62; FF 208. At trial, Enforcement Counsel argued that Sequoia's loan review policy was inadequate because several loans reviewed at the December 31, 1992 examination were downgraded to classifications lower than those assigned by Sequoia. RD at 11. The ALJ indicated that classifying loans is inherently subjective. RD at 12, 70; FF 248. Because Sequoia eventually agreed with the OCC regarding loan downgrades, and because virtually all of the loans downgraded by the OCC eventually were fully repaid, the ALJ concluded that Enforcement Counsel failed to demonstrate a material inadequacy with Sequoia's loan review policy. RD at 12, 70; FF 246, 250.

Enforcement Counsel excepts to the ALJ's conclusion. Enforcement Counsel argues that the ALJ erred in his conclusion regarding Sequoia's compliance with Article X because the ALJ gave substantial weight to Respondent's evidence that virtually all of the loans downgraded by the OCC eventually were fully repaid. Enforcement Counsel's Exceptions at 13.

Discussion:

The Comptroller reverses the ALJ's conclusion.[5] Even if Sequoia eventually agreed with the OCC regarding loan downgrades, and even if the loans downgraded by the OCC eventually were fully repaid, that simply would not exonerate the Board from failing to properly classify its loans in the first place. Article X of the Order required the Board, within 60 days, to formulate and implement an effective loan review program, which program was to assure timely identification of problem loans in Sequoia's loan portfolio. Order at 15. Sequoia hired an outside consultant, JRC Associates, to conduct loan

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[5] The ALJ's Decision states that "Sequoia did not violate Article X of the Consent Order, as its loan review policy made good faith, reasonable efforts, at detecting credit risk within the portfolio." RD at 70; FF 246 (citing OCC Exhibit 12 at A-16). A review of OCC Exhibit 12, and in particular pages 2 and A-16 of same, supports a different conclusion from that reached by the ALJ. On page Ao16, the OCC examiners concluded that Sequoia was not in compliance with Article X's requirements because "[t]he Board did not implement an effective loan review program within 60 days. An external loan firm was engaged to perform this function. However, the first review was postponed because it . . . was planned concurrently with our examination." OCC Exhibit 12 at A-16. Moreover, on page 2 of this exhibit, the examiners informed the Board that "[l]oan portfolio supervision is extremely poor and has not improved. Poor underwriting and loan supervision practices continue." OCC Exhibit 12 at 2. Such language belies Respondent's claim that he made a good faith, reasonable effort at portfolio supervision.

reviews in July and December, 1992.
Clearly, Sequoia did not meet the 60 day deadline to which it had committed itself. RD at 67; FF 231.

A loan review program is effective if it accurately grades the loans in a bank's portfolio so that problem loans and associated credit risk and loss potential may be identified. 1 Tr. at 177. As evidenced by the findings at the December 31, 1992 examination, the Bank's loan review program failed to properly grade and identify problem loans at that time. During this examination, the OCC's examiners downgraded 10 of the 41 loans that were reviewed, which loans totalled $2,565,000. 1 Tr. at 179; OCC Exhibit 127.

Additionally, while Sequoia may have eventually agreed to downgrade certain loan classifications, Respondent delayed compliance. For example, a meeting was held between OCC representatives and various Board members on October 23, 1992 at which a $423,000 loan was discussed. 1 Tr. at 57; Respondent's Exhibit WS 1. The OCC insisted that this loan be charged off. OCC Exhibit 36 at 4. The majority of the Sequoia Board was convinced by Respondent and Sequoia's president to delay such action. The record shows that because of advice received from Respondent, Director Granholm did not recommend to the Board that this loan be charged off. OCC Exhibit 140 at 36.[6]

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[6]Moreover, the fact that a classified loan is subsequently repaid does not alter the fact that it had been subject to a risk of nonpayment. The Comptroller has specifically ruled that an examiner's determination, based on his experience and training, that a loan fails to satisfy accepted standards of prudent banking operations, cannot be measured by subsequent events.

5. Respondent Did Not Comply With Article XII

Background:

Article XII of the Order required that the Board maintain written documentation indicating the factors considered and conclusions reached by the Board in determining the adequacy of the Allowance for Loan and Lease Losses ("ALLL"). Order at 19-20. The ALJ concluded that Board failed to comply with this requirement, despite having submitted monthly ALLL reports to the OCC, because none of the reports submitted clearly explained the methodology employed in arriving at Sequoia's loan loss reserve. RD at 13, 71-80; FF 251-96. Respondent excepts, arguing that these monthly reports, labelled Respondent's Exhibits WS 1-6, gave a detailed analysis of both the methodology underlying Sequoia's ALLL calculations, as well as substantiation for the loss factors Sequoia employed.[7] Respondent's Exceptions at 12- 13; Respondent's Brief at 19.

Discussion:

The Comptroller adopts the ALJ's conclusion. A review of the

Thus, the fact that a loan is ultimately repaid does not affect the validity of the examiner's determination of the risk of nonpayment. In re Lakeside Nat'l Bank, No. AA-SW-90-165, 11-12 (May 8, 1992). The Comptroller concludes that the ALJ should not have considered the ultimate disposition of the loans in question, and that Enforcement Counsel proved by a preponderance of the evidence that Respondent violated Article X.

[7] A loss factor is a percentage that is a multiplied by the total dollar amount of a pool of loans so as to provide an estimate of the loss potential for those loans. 1 Tr. at 200.

above referenced monthly reports does not reveal any detailed analysis of the methodology underlying Sequoia's loan loss reserve calculation. The Order specifically required that Sequoia's program for calculating its ALLL should be developed and implemented consistent with Banking Circular # 201 and Section 217 of the Comptrollers Handbook for National Bank Examiners. Order at 19. In fact, Respondent's explanation of the methodology underlying its ALLL calculation did not establish how Sequoia's ALLL calculation was consistent with, or indeed, whether Sequoia even considered, Banking Circular # 201 and the Comptroller's Handbook.

An effective program for the maintenance of an adequate ALLL requires that the institution accurately grade or risk rate its loan portfolio. Moreover, the bank must use a reasonable loss factor. RD at 71; FF 253. Sequoia did neither.

With regard to proper risk rating of Sequoia's portfolio, Respondent claims that the OCC simply cannot understand Sequoia's methodology because of the institution's history of no loan losses prior to 1992. Respondent's Exceptions at 12-13. However, rather than supporting Respondent's claim that Sequoia properly calculated its ALLL, Sequoia's history of no recognized loan losses prior to 1992 stands as a strong indication that Sequoia was not properly recognizing bad credits in its portfolio. In fact, the Order became necessary precisely because Sequoia's loan classification system was faulty.[8]

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[8] An example of Sequoia's inability to recognize bad credits is the California Properties loan. California Properties involved a second mortgage position on a hotel. 1 Tr. at 180. The property's cash flow was insufficient to service the Sequoia loan, and the borrower was unable to

Moreover, with regard to its use of loss factors, Sequoia's methodology again was deficient. Sequoia's ALLL policy neither explained nor supported the percentages employed as loss factors. RD at 73; FF 263; 1 Tr. at 202. Finally, the problems with methodology were not abated within a reasonable time frame. Sequoia's ALLL methodology was inadequate and its loss factors unsupported through the December 31, 1992 OCC examination of Sequoia. RD at 79; FF 294; 4 Tr. at 757. [9]

6. Respondent Did Not Comply With Article XIII

Background:

Article XIII of the Order required that Sequoia's Board obtain

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cure severe delinquencies on the first deed of trust, real estate taxes, and on a ground lease. Moreover, in the event that foreclosure was initiated by the first lien holder, Sequoia was not in a position to take out that loan because of its size. Therefore, Sequoia's position effectively was unsecured. Respondent's Exhibit WS 1. Despite this, Sequoia classified this credit as substandard. 1 Tr. at 184.

[9] In calculating its ALLL, Sequoia apparently relied heavily upon a Journal of Commercial Lending article. See Respondent's Exhibit WS 1, referencing Eric Weinstein, ALLL Things Considered: Evaluation of the Adequacy of the General Reserve for Loan Loss. Journal of Commercial Lending, Feb. 1992 ("Weinstein") at 6. However, if anything, this article actually undercuts Respondent's claim that its ALLL methodology was necessarily complex because Sequoia had not taken a loss prior to 1992. The article's author pointed out that historical loss experiences are fictitious and should not be used in calculating a bank's reserves. Weinstein at 14.

current and satisfactory credit information for all loans lacking such information. Order at 20. The ALJ concluded that Respondent failed to take reasonable efforts to obtain updated financial information regarding these loans, but that Respondent's inaction was merely technical in nature. Still, the ALJ found Respondent's non-compliance sufficient to warrant imposing a CMP. RD at 15-16: see also RD at 80; FF 298.

While Respondent concedes that he failed to live up to the letter of the Order, Respondent excepts from the ALJ's conclusion that such technical noncompliance can be a sufficient basis for imposing a CMP. Respondent's Exceptions at 13-14. Enforcement Counsel also excepted, arguing that Respondent's failure to comply with Article XIII was a substantial act of noncompliance with the Order's requirements. Enforcement Counsel's Exceptions at 10-12.

Discussion:

The Comptroller agrees with the ALJ that Sequoia violated Article XIII, although the Comptroller believes that the violation was more than technical. Respondent's own testimony establishes that his noncompliance cannot be viewed as a minor breach of the Order, but rather was substantial and intentional. See RD at 15; 2 Tr. at 466-67.

7. Respondent Did Not Comply With Article XV Background:

Article XV of the Order required Sequoia to maintain an eight percent Tier 1 capital level. Order at 22. Sequoia's Tier 1 capital requirement dropped slightly below this target figure for approximately the first five months of 1993, but the ALJ concluded that this was caused by an OCC imposed valuation change. RD at 83; FF 310. The valuation change at issue concerned Sequoia's overstating of the value of excess servicing fee receivables based on assumptions not supported by industry

practice. OCC Exhibit 12 at A-12. The ALJ noted that Sequoia had met the required capital figure prior to the valuation change being imposed on it, and after the valuation change was imposed, Sequoia took the steps necessary to restore the capital account to the desired level. RD at 16-17, 83: FF 310. Therefore, the ALJ concluded that Respondent did not violate Article XV. RD at 17; FF 311.

Enforcement Counsel excepts, arguing that Respondent was on notice as of the June 30, 1992 examination that the valuation change might be imposed. Moreover, Enforcement Counsel excepts to the ALJ's finding that Sequoia restored the capital account to the desired level after the valuation change was imposed. Enforcement Counsel argues that because the capital level was deficient as of December 31, 1992, a subsequent increase in same does not undo the existence of a prior violation. Enforcement Counsel's Exceptions at 20-21.

Discussion:

The Comptroller reverses the ALJ's conclusion that Respondent did not violate Article XV because Respondent had ample notice that the valuation change could be imposed. Moreover, Respondent's subsequent sale of assets over five months to "cure" the violation does not mean that no violation occurred in the first place. RD at 83; FF 310.

Respondent knew nearly five months in advance that the relevant write off might be required. With the OCC having completed an examination of Sequoia as of June 30, 1992, a meeting was held on August 5, 1992 between OCC representatives and Sequoia personnel to discuss the examination's conclusions. Raymond Sander, the OCC bank examiner in charge of the Sequoia examinations, testified that Respondent was present at that August meeting at which Sequoia's management was made aware that the OCC questioned the value assigned to these fees.

Moreover, Sander testified that Respondent was made aware that this valuation would again be considered at the December, 1992 meeting. 3 Tr. at 731-32; RD at 38-39; FF 92-93.

Furthermore, the examination report itself indicated that because Sequoia used assumptions unsupported bv industry practices to value the excess servicing fees at issue, the value attributed to these excess fees was overstated, and therefore Sequoia's capital position necessarily was overstated as well. OCC Exhibit 12 at A-12. A logical corollary to such a conclusion is that Sequoia would ultimately have to substantiate the contrary-to-market assumptions underlying the value assigned to these fees, or write the fees down to a market level. Finally, with regard to the ALJ's Finding of Facts (FF 310, 311) - specifically, that because Sequoia sold certain assets in order to cure the capital deficiency, Respondent therefore was not in violation of the Tier 1 capital requirement - Respondent still cannot be excused from responsibility for noncompliance with Article XV. [10]

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[10] Additionally, while not directly on point, the bank was put on notice via the June 30, 1992 Summary of Condition that Sequoia's capital levels generally were considered marginal, and that anticipated losses going forward would further erode its capital position, which could result in violations of the minimum capital standard. OCC Exhibit 12 at A-4. An argument can be made that Sequoia should have been prepared for an erosion in its capital base, if not from the required write off of the servicing fee receivables, then from anticipated loan losses. Had Sequoia taken steps to boost its capital position in anticipation of those loan losses, then Sequoia still might have been able to maintain the required Tier 1 capital level despite the write down in the receivables' value.

IV. Amount of Civil Money Penalty

Section 1818(i)(2) of the Federal Deposit Insurance Act provides that any institution-affiliated party who violates any written agreement between the depository institution and its regulatory agency shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues. 12 U.S.C.A. § 1818(i)(2)(A) (1994). Because Respondent is an institution-affiliated party, and because Respondent has been determined to have violated the Order, a civil money penalty may be imposed on Respondent. In calculating the CMP, certain factors must be considered. Specifically, the agency must consider "(i) the size of the financial resources and good faith of the insured depository institution or other person charged; (ii) the gravity of the violation; (iii) the history of prior violations; and (iv) such other matters as justice may require." 12 U.S.C.A. § 1818(i)(2)(G) (1994).

As discussed above, the Comptroller adopts most, but not all, of the ALJ's Findings of Fact and Conclusions of Law. The Comptroller does not adopt the ALJ's findings and conclusions that: (1) Respondent did not violate Articles X and XV of the Order: (2) Respondent demonstrated good faith in attempting to comply with the Order; and (3) Respondent's violations of Articles VI, VII, IX, X, XII, and XIII were merely technical. Nonetheless, as discussed below, the Comptroller adopts the ALJ's recommendation that a $10,000 CMP be imposed on Respondent.

A. Respondent's Financial Resources

Respondent's financial resources are not at issue in the instant action. Respondent has stipulated that he has adequate funds to pay a $10,000 CMP. RD at 19; Joint Exhibit at 1.

B. Respondent's Good Faith

Respondent's good faith is at issue. The ALJ concluded that Respondent exhibited good faith in attempting to comply with the Order's requirements, a conclusion that Enforcement Counsel strenuously objected to. RD at 19; Enforcement Counsel's Exceptions at 1-3, et seq. In the Comptroller's view, Respondent's extensive work experience and knowledge base must be considered in evaluating his good faith.

Respondent is not a neophyte in the banking world. Having worked as a commissioned National Bank Examiner, having held responsible positions at major banking institutions, having formed and operated two different banks, and having taught banking law at a local university, Respondent must have known what was required of him in order to achieve full compliance with the Order's requirements. 2 Tr. at 271-74. Therefore, Respondent's failure to implement the Order's requirements is a matter of concern to the Comptroller and suggests a lack of good faith by Respondent.

Moreover, as discussed above, some of Respondent's actions suggest intentional noncompliance with some of the Order's mandates. For example, Sequoia did not adopt a liquidity contingency plan. Respondent doubtless knew this, and despite such knowledge, insisted that such a plan was in place. See supra text at 4-5. Additionally, Respondent was obligated to secure up-to-date credit information from existing borrowers. Respondent testified that, in some cases, he actually dictated to subordinates that they not ask borrowers for said information. RD at 15;2 Tr. at 466-67.

Finally, Respondent's own testimony -- claiming that management, not the Board, was responsible for any noncompliance; asserting that despite his position in the Board's majority faction, he could not accomplish anything; arguing that he could not reasonably have anticipated that the overvalued servicing fee receivables would have to be written down; noting that the potential of lender liability suits precluded him from asking borrowers to provide up-to-date financial information; asserting that Sequoia's president had insufficient time in his day to be able to revise Sequoia's loan policy, and that subsequent collection of classified debt excuses incorrect classifications -- lacks credibility, given Respondent's own credentials, leading to the conclusion that his noncompliance with the Order's

requirements does not evidence good faith.

C. Gravity of Respondent's Violations

Under § 1818(i)(2)(G), the agency must consider the gravity of the violations involved. Respondent's failure to adhere to seven of the Order's Articles indicates the existence of a very serious problem. However, while the Comptroller reverses the ALJ's conclusion that Respondent complied with Articles X and XV of the Order, Sequoia's 1992 loss was caused by nonperforming loans, which loans predated the Order's signing. Nothing in the record indicates that Respondent's compliance with the Order's terms, and specifically with Articles X and XV of the Order, would have avoided the loss. Therefore, the Comptroller does not believe that Respondent's failure to comply with Articles X and XV warrants increasing the ALJ's recommended CMP of $10,000.

D. Sequoia's History of Prior Violations

Under § 1818(i)(2)(G), Sequoia's history of prior violations also should be considered. Problems addressed in the Order such as unreasonable reliance on volatile funds, an unacceptable ALLL, and inadequate loan portfolio supervision, were first cited by the OCC in its February 29, 1988 examination of Sequoia. RD at 3-4. The March 31, 1990 examination concluded that many of the problems cited in the

prior year's examination had not yet been addressed. RD at 4. These same problems were again cited in the 1991 report of examination. Thus, despite the passage of more than three years, the problems cited in the February 1988 examination still troubled Sequoia in 1991. As a result of the July 1991 examination's findings, Sequoia and the OCC entered into the March 4, 1992 Order. RD at 4-5.

E. Other Factors

Finally, in determining whether to impose a CMP, § 1818(i)(2)(G) permits the Comptroller to consider other matters as required in order to achieve a just result. In these proceedings, Respondent seeks consideration of two matters. The first involves a claim of collusion; the second is Respondent's claim that a schism within the Board undermined his efforts to comply with the Order.

Regarding the claim of collusion, in his Exceptions Respondent claims that collaboration between Sequoia Board member John F. Henning, Jr. and Enforcement Counsel culminated in a deal pursuant to which the OCC reduced its civil money penalty assessments against Henning and Peter Bolles, another Sequoia Board member, in exchange for their testimony before the ALJ. Respondent's Exceptions at 2. Moreover, according to Respondent, Enforcement Counsel surreptitiously made available to Henning unredacted copies of OCC

Reports of Examination and other documents for use against Respondent in a civil action brought by Sequoia shareholders. Respondent's Exceptions at 3. Therefore, Respondent argues that the ALJ should never have permitted Henning and Bolles to testify, nor should the ALJ have admitted into evidence documentary evidence they prepared. Id. at 2.

There is insufficient evidence in the record to support Respondent's claim of collusion. In attempting to establish the existence of the collusion, Respondent relied heavily upon testimony elicited during his cross examination of Henning. 4 Tr. at 797-99, 803-06, 808-10. However, the testimony that Respondent elicited during his cross examination of Henning was uncorroborated. As it went unaddressed in his Recommended Decision, the ALJ apparently concluded that Respondent's collusion argument was meritless. Similarly, the Comptroller considers the evidence brought out by the cross examination, and concludes that Henning's uncorroborated statements cannot be relied upon. More importantly, even assuming, arguendo, that Respondent's self-serving collusion claim is credible, that fact does not excuse Respondent's noncompliance with the Order.

The second matter concerns Respondent's claim that his efforts at complying with the Order's requirements were undermined by other

Board members. Initially, it should be noted that between June 30, 1992 and December 31, 1992, two distinct factions arose within the Board. OCC Exhibit 43 at 7. Moreover, the dispute became so antagonistic that various members of the Board made criminal referrals regarding other Board members, including Respondent. OCC Exhibit 43 at 7. Because of the existence of this schism, Respondent claims that the ALJ erred in finding him culpable for Sequoia's noncompliance with the Order.

Moreover, Respondent claims that after August 1992, he no longer was actively involved in Sequoia's management. As such, he seeks to hold the management that was in place accountable for failing to implement his so-called Sarsfield Action Plan, a plan that he indicates would have addressed compliance with Article XV. In so arguing, Respondent seeks to undermine the ALJ's conclusion that Respondent dominated Sequoia's Board of Directors. Respondent's Exceptions at 6; see also, RD at 23; FF 17.

In support of his claim that other Board members undermined his efforts at achieving compliance with the Order, Respondent references language found within Enforcement Counsel's Prehearing Statement. Specifically, Respondent claims that the OCC admitted that the minority faction on Sequoia's Board acted as a roadblock when the

majority attempted to bring about change at Sequoia. Respondent's Exceptions at 3-4. However, by neglecting to include other language contained within it, Respondent changes the meaning that Enforcement Counsel sought to convey in the Prehearing Statement. The Statement plainly indicates that the entire Board, including Respondent, the presence of factions notwithstanding, was responsible for achieving the Order's requirements. Enforcement Counsel's Prehearing Statement at 10-12.

Moreover, Respondent was a member of the majority faction, and according to Respondent's own testimony, the majority Board members always had the ability to outvote the Board's minority. 3 Tr. at 542-47. Finally, as a director of Sequoia, Respondent was at all relevant times an institution-affiliated party under 12 U.S.C. §§ 1813(u) and 1818(i), and had a statutory and fiduciary duty to ensure Sequoia's compliance with the Order. Therefore, even if Sequoia's board meetings were acrimonious, as a matter of law Respondent still was obligated to obtain Sequoia's compliance with the cease and desist order, or take actions designed to bring about that result, such as seeking out new management for the bank.

With regard to Respondent's claim that he no longer was involved in Sequoia's management after August, 1992, Respondent

served as Sequoia's senior executive officer for those several months after the Order was executed within which compliance with most of its requirements was required. Moreover, even though he eventually resigned from his position as Sequoia's senior executive, Respondent remained Sequoia's Chairman of the Board through January, 1993. OCC Exhibit 21; OCC Exhibit 43 at 7.[11] Furthermore, an attorney employed by Sequoia concluded that Respondent was involved in Sequoia's daily management through at least December 14, 1992. OCC Exhibit 37 at 2. Finally, even if Respondent no longer was an active member of Sequoia's management, and did not dominate the Board, Respondent still was obligated to obtain Sequoia's compliance with the Order. If he was unable to accomplish that, then he should have taken appropriate alternative actions, including attempting to secure new management willing to comply with the Order's terms.

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[11] Sequoia's Summary of Condition as of December 31, 1992 also indicates that despite Respondent's resignation as an executive officer, his dominant decision making position and active participation in Sequoia's daily activities led examiners to conclude that he was an executive officer for purposes of Regulation O, at 12 C.F.R. Part 215. OCC Exhibit 43 at 7.

V. Order

Based upon the entire record of the proceedings, the pleadings, the ALJ's Decision, Exceptions to the Decision filed by both Respondent and Enforcement Counsel, and for the reasons set forth in the Accompanying Decision, the Comptroller hereby orders Respondent to pay a civil money penalty in the amount of $10,000.

IT IS SO ORDERED this 21st day of July, 1995.

/s/ Eugene A. Ludwig

Comptroller of the Currency

[Rec. Mar. 8, 1995]

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

AA-EC-93-144

IN THE MATTER OF
WILLIAM S. SARSFIELD, Former Chairman of the Board and
Current Director;
KENT D. GLOVER, Former President and Current Director;
CHARLES PUCCINELLI,
PETER P. BOLLES, THOMAS J. NIEDERMEYER, SR., and
RICHARD C. VAN VALER,
All Former Directors; JOHN F. HENNING, JR., and NORMAN I. KRUG,
Current Directors,
of SEQUOIA NATIONAL BANK, San Francisco, California

EXCEPTIONS TO ADMINISTRATIVE LAW
JUDGE'S RECOMMENDED DECISION BY
RESPONDENT WILLIAM C. SARSFIELD;
DECLARATION OF MICHAEL W. McCANN

Respondent respectfully submits the following exceptions to the Recommended Decision of Arthur L. Shipe, Administrative Law Judge, filed herein on or about February 3, 1995.[1]

EXCEPTION NO. 1:

Exception is taken to the Court's denial of Respondent's Post-Hearing Motion to Strike Section II of the OCC's Reply Brief, and the Court's acceptance of and reliance upon the testimony of, and documentary evidence prepared by, OCC witnesses HENNING and BOLLES. (ALJRD, p.2, fn.1.)

SUPPORTING EVIDENCE AND ARGUMENT

Respondent incorporates herein his previous argument and citation to evidence demonstrating the personal vendetta engaged in my Henning, in collaboration with the OCC, to force Respondent out of management of the Bank. (ROB 2:6-4:16; Respondent's Reply Brief (hereinafter "RRB") at p.2:11-3:8).

To summarize, this collaboration between Henning and the OCC culminated in a "deal" being struck between Henning and OCC counsel, pursuant to which the OCC reduced the civil money penalty assessment against Henning and Bolles to $950 in exchange for their previous

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[1] All citations to the Recommended Decision are by reference to the page and paragraph and will be preceded by the abbreviation "ALJRD"; references to exhibits introduced into evidence by the OCC will continue to be identified as "OCC 1", et seq.; citations to Respondent's exhibits will continue to be referenced as "WS 1", et seq.; citations to testimony at the trial on June 6-10, 1994 will continue to be referenced by page and line number and the abbreviation "TP"; citations to Respondent's Opening Brief are referenced as "ROB".

collaboration and trial testimony. Respondent continues to respectfully contend that all testimony of, and documentary evidence prepared by, Henning and Bolles is incompetent and should not be considered.

As further evidentiary support for this argument, Respondent refers to Exhibit 1 attached to the accompanying declaration of Michael W. McCann. Exhibit 1 is a true and correct copy of excerpts of a deposition given by John F. Henning on November 16, 1994 in San Francisco Superior Court Action No. 950665, which is a shareholder's derivative suit against Respondent and other directors of Sequoia National Bank. In Exhibit 1, Henning admits that following his testimony in these proceedings (in June of 1994) and finalization of the settlement agreement between Henning and the OCC, the OCC (through Attorney Bloise) surreptitiously and gratuitously made available to Henning unredacted copies of the OCC Reports of Examination, along with other documents, to be used against Respondent in the San Francisco Superior Court action. (See Exhibit 1, pp. 573:21-578:25.)

This evidence of the continuing collaboration between Henning and the OCC, now carried over into a continuing attack on Respondent in the context of other litigation in which Respondent is a defendant, dramatically demonstrates the misconduct of the OCC in these proceedings and the reason why the testimony of, and documentary evidence prepared by, Henning and Bolles upon which the OCC's case so heavily depends, must be stricken.

EXCEPTION NO. 2:

Exception is taken to the Court's statement that

". . . the minority faction of the board genuinely wanted to achieve

compliance with the consent order...." (ALJRD p.7, second full paragraph.)

SUPPORTING EVIDENCE AND ARGUMENT

In its own Pre-Hearing Statement the OCC admitted that the minority faction on the bank's Board ". . .acted as a roadblock . . . taking solace in their outsider status and refusing to work with the majority to alter the Bank's policies and practices . . . the minority group . . . equated anything that was beneficial to the majority group with a detriment to the Bank . . . the primary duty of the minority group directors during the period of non-compliance was to attempt to achieve compliance with the Consent Order, not to attempt to thwart any initiative which might have the secondary effect of allowing the majority group to retain effective control of the board." (Emphasis added; ROB 3:8-20; OCC Pre-Hearing Statement pp. 10-11.)

The significance of this issue has to do with the allegations by the OCC (endorsed at least in part by the Court in its Recommended Decision), that the Board somehow delayed or prevented implementation of recommendations made by the liquidity consultant (Catalano) retained in July of 1992. While Respondent denies this allegation (see Exception No. 3 below), even if true any resulting non-compliance is attributable to the members of the minority faction of the Board (Henning and Bolles), not Respondent. This conclusion is further corroborated by the candid admissions of OCC examiners Ragus and Sander that, after August of 1992 Respondent was "no longer involved in management" and not "involved with the Compliance Committee or compliance with the Consent Order". (See ROB 5:17-22; TP 104:19-22; TP 152:20-25; TP 233:5-8; TP 734:23-735:2.)

EXCEPTION NO. 3:

Respondent takes exception with the Court's statement that: "The various board members . . . could not agree on the implementation of these recommendations [by liquidity consultant Catalano]. After considerable debate, the majority faction of the board (to which Respondent Sarsfield belonged) rejected the consultant's recommendations (advocated by the minority faction), and implemented the institution's own liquidity plan." (Emphasis added; ALJRD p.8, first full paragraph.)

"While the plan ultimately implemented by the board may have had the effect of increasing liquidity levels, it clearly did not set forth a sufficient contingency plan which was expressly required by the Consent Order." (ALJRD p.8, second full paragraph.)

"[T]he issue is whether the board implemented a satisfactory contingency plan as required by the OCC Order, and it is my conclusion . . . that the board did not, thereby failing to comply with Article VI of the outstanding Order." (ALJRD p.8, third full paragraph.)

Respondent further takes exception to Findings of Fact ("FOF") Nos. 4-17, 117, 119, 123, 142, 144, 145, 146, 147, 148, 149, 151, 152, 153, 155, 161, 162, 163, 164, 167, 172, 174, 179, 181, 182, 183, 184, 185, 186 and 187.

SUPPORTING EVIDENCE AND ARGUMENT

In essence, the OCC argued and the Court has found that:

1. After September of 1992, Respondent dominated the Board;

2. The Board "rejected the consultant's [Catalano] recommendations (advocated by the minority faction), and implemented the institution's own liquidity plan" (ALJRD p.8, first full paragraph); and

3. The Board did not implement a satisfactory contingency

plan as required by the OCC Order.

As a preliminary matter the assertion that Respondent "dominated the Board" after his withdrawal from active participation in bank management in August of 1992 is simply not supported by any evidence in the record. To the contrary, OCC examiners Ragus and Sander both admitted at the trial that the exact opposite was the case, i.e., that Respondent was "no longer involved in management after August 1992 (TP 734:23-735:2), and that Respondent was not "involved with the Compliance Committee or compliance with the Consent Order" (Emphasis added; TP 104:19-22).

Secondly, these proposed findings ignore the fact that implementation of Catalano's recommendations was a management function (i.e., acting President Granholm), not the Board or Respondent. In fact, the recommendations regarding liquidity management (including the liquidity contingency plan) formulated by Catalano essentially reiterated what Respondent had put in his recommendations which he had presented to and persuaded the Board to adopt in August of 1992 (WS 37, last two pages; OCC 62, p. 2).

Moreover, the assertion that the Board rejected Catalano's recommendations is not supported by the record. At the October 28, 1992 Board meeting, it was "recommended that the Bank continue to strictly adhere to the policy of eliminating brokered accounts, and identified the need for the Board to adopt a strategy for increasing core deposits." (OCC 27, p.3, section 3.7); improvement in the methodology by which management reported on liquidity to the board to respond to OCC criticisms was discussed (OCC 27, p.3, section 3.7); "Board members commented that management and Catalano should work together to endorse one program of reporting the Bank's liquidity position to the Board" (OCC 27, p.4).

At the October 30, 1992 Compliance Committee meeting, Catalano commented that the existing asset/liability policy of the Bank "was a good program", but needed to be updated. Granholm agreed. OCC 28, p.1, section 1.1.)

At that same meeting Bolles (a member of the Board and the Compliance Committee) met with Catalano "to discuss her ongoing relationship with the Bank, her new position with the Secura Group, and the possible need for the Committee and Catalano to provide the Board with more definitive reports." (OCC 28, p.2, section 5.0.)

At the November 24, 1992 Board meeting, the Board discussed the fact that the OCC wanted Bank management to report the Bank's liquidity position to the Board utilizing the methodology recommended by Catalano and the Board took appropriate action to ensure compliance with the OCC's position on the matter. (OCC 33, p.8, paragraphs 2 and 3.) With respect to a contingency plan in the event of a liquidity "emergency", the Board noted that such a plan had been adopted in August of 1992 pursuant to the recommendations of Respondent. (OCC 33, p.8, para. 4.) Bank management (i.e., not Respondent) was directed to prepare "a contingency liquidity plan for Board review at the upcoming December 16, 1992 meeting. (OCC 33, pp.8-9.)

At the December 16, 1992 Board meeting, director and president Granholm was forced to leave the meeting at 5:00 p.m. due to a family emergency (OCC 38, p.7). However, in Granholm's absence the Board still proceeded with the liquidity contingency plan and liquidity report that Granholm had prepared. (OCC 38, p.7.) With respect to anticipated liquidity requirements coming up in 1993 (due to maturity of large CD's), Respondent noted that there was in existence a contingency plan to sell loans and equity line accounts. Respondent further reminded the Board

that Laughlin National Bank was a prospective purchaser of commercial real estate loans, if that need also arose. (OCC 38, p.7.) Respondent had first devised and implemented this liquidity contingency plan in his April 8, 1992 first monthly report to the OCC. (WS 1, pp. 7-13, specifically p. 13.)

Although the OCC criticized the Bank for not executing its liquidity contingency plan by selling the loans in question before December 31, 1992 (FOF 177), that was never a requirement of the Consent Order. In fact, by the OCC's own admission, these loans were sold in early 1993 well in advance of the maturity date of the large CD's which Respondent had correctly anticipated all the way back in April of 1992 would create the need for increased liquidity to be supplied by sale of these loans.

To summarize, Respondent devised the liquidity contingency plan as early as April of 1992, caused the Board to formally adopt the adopt the plan in August of 1992, and the Board implemented the plan in early 1993 well in advance of the need to increase its liquidity caused by the maturing large CD's. The Bank's alleged "failure" to sell the loans prior to December 31, 1992 was never a requirement of the Consent Order. In fact, selling the loans earlier than the Bank did (i.e., in 1993) would have been an unnecessary dissipation of profit producing bank assets months in advance of the need to do so.

Moreover, there is absolutely no evidence in the record that the Board ever "rejected Catalano's recommendations". To the contrary, OCC 27, 28, 33, 38, 62 and WS 1 and 37 all conclusively demonstrate that Respondent formulated the required liquidity contingency plan, consultant Catalano adopted that liquidity contingency plan in her own recommendations, after September of 1992 management continued to

work with Catalano and the Compliance Committee to implement that plan, and the plan was in fact executed in early 1993 concurrent with the maturation of the large CD's that Respondent had identified all the way back in April of 1992 as the triggering event for the liquidity contingency plan.

EXCEPTION NO. 4:

Respondent takes exception with the Court's conclusion that, with respect to Article VII (Bank Reliance on Volatile Liabilities) ". . . The information submitted ... does not ... sufficiently specify the board's intended plan, nor does it contain adequate discussion of the alternate means by which the board intends to remedy the cited concern." (ALJRD p. 9, second full paragraph.) Respondent also takes exception to related FOF Nos. 186 and 187.

SUPPORTING EVIDENCE AND ARGUMENT

In his initial report following execution of the Consent Order, Respondent specifically addressed the concerns in Article VII, and set forth the Bank's plan for reducing its reliance on volatile liabilities. (WS 1, p. 49-50, "March 30, 1992 Volatile Funds"). On page 50 of WS 1, Respondent set forth the "Plan": (1) to reduce reliance on brokered funds by $2,563,000 as of December 1992 and (2) and to hold the balance of funds subject to interest rate limits.

On September 3, 1992 Respondent prepared a report for the Board entitled "Deposit and Liquidity Report". (WS 18.) In this report, it was reported that CD's had been reduced from a March 31, 1992 balance of $32,831,000 to an August 31, 1992 balance of $27,884,000. (WS 18, p. WS 00017) Thus, not only had Respondent specified the Board's intended plan in April of 1992, his report to the Board in September of 1992 demonstrated that by August of 1992 the Bank more than accomplished

the plan objective and had been able to reduce "volatile liabilities" almost $2.4 million more than the goal for December of 1992 set forth in the April 1992 plan.

EXCEPTION NO. 5:

Respondent takes exception to the Court's statement that ". . . [F]urther concerted effort was required on numerous provisions [of the loan policy], and the proposal set forth by the board did not sufficiently comply with the requirement of the outstanding Order. (Emphasis added; ALJRD p.11, first partial paragraph.) Respondent also takes exception to related FOF Nos. 81 and 191-207, inclusive.

SUPPORTING EVIDENCE AND ARGUMENT

Respondent concedes the accuracy of and would not take exception to any of the above material if it were limited to the period covered by the Examination of June 30, 1992. However, Respondent does take exception to the Court's conclusion and related findings of fact because they ignore the uncontested and undisputed evidence at trial that the OCC agreed after the June 30, 1992 Examination that the Bank could and should defer the final revisions to its written loan policy to enable acting president Granholm to focus on other more critical issues. (See ROB 11:9-14:21, and especially the material at ROB 13:9-17, and the portions of the transcript cited therein and WS 11.)

This prioritization and deferral of the final revisions to the Bank's written loan policy from August 1992 through December 1992 was specifically and expressly agreed to by the OCC. The OCC offered no denials or contrary evidence whatsoever at the trial on this issue. It is also uncontroverted that in December 1992 Mr. Granholm did submit the previously deferred final revisions to the Bank's written loan policy, and the Board adopted those revisions and the OCC approved them in early

1993.

It is thus beyond despite and cannot be controverted, that after June 30, 1992 the deferral of the final required revisions to the Bank's written loan policy was specifically acquiesced in by the OCC. Consequently, the OCC is estopped from asserting otherwise in these CMP proceedings.

EXCEPTION NO. 6:

Respondent takes exception to the Court's conclusions that the monthly reports prepared by Respondent did not ". . . [c]learly explains the methodology employed in arriving at these various standards [ALLL] . . . . [T]he board did not set forth ... a satisfactory explanation for the amount of allowance allocated for the various assets within the portfolio." (ALJRD p.13, paras. 3 and 4.) Respondent also takes exception to related FOF Nos. 257, 258, 259, 263, 267-271, inclusive, 273, 276, 279-290, inclusive, 293 and 296.

SUPPORTING EVIDENCE AND ARGUMENT

Respondent incorporates herein by reference his argument and earlier citations to evidence contained in ROB 18:8-21:8.

It has been conceded by the OCC, and determined by the Court, that the Bank's methodology by which it determined ALLL, and the Bank's ALLL itself, were adequate throughout 1992.

It is also undisputed that, because of the Bank's uniquely excellent history of no loan losses prior to 1992, the Bank (and Respondent) were placed in the ironic paradox of having to develop a methodology for determining ALLL that was itself, by definition, necessarily unique, and therefore much more complex than that of a bank with a less successful record of prior loan losses. (ALJRD pp. 13-14.)

In light of these uncontroverted facts, the OCC is in the final analysis, reduced to contending only that Respondent's explanation of this admittedly unique and complex methodology was unsatisfactory, as the examiners apparently did not understand the methodology and respondent's explanation. The Court has determined that the OCC's inability to understand the methodology is a sufficient basis for assessing a CMP, notwithstanding the uncontroverted fact that the methodology was adequate and the resulting ALLL proven more than sufficient.

Respondent respectfully submits that this logic cannot, or at least should not, provide the basis for assessment of a CMP. Respondent does not mean to be overly critical of the inability of the OCC examiners to understand the methodology employed by the Bank. After all, everyone concedes that, due to the Bank's unique history of no loan losses prior to 1992, the methodology was of necessity unique and therefore unfamiliar to the OCC. Respondent nevertheless must state that, on this record, assessment of a CMP is both inequitable and unjustified. Otherwise, every director of every bank in the United States is subject to a civil money penalty assessment upon no more proof other than that the OCC does not understand why a bank's operations have been successful.

EXCEPTION NO. 7:

Respondent concedes that, under the conditions as described in the Recommended Decision, the decision by the Bank (and Respondent) not to demand updated financial information from certain borrowers on "precarious loans" where the Bank's primary objective was collection could be construed as "technical non-compliance with Article XIII of the Consent Order." However, Respondent does take exception with the Court's conclusion that such "technical non-compliance" forms "... [a] sufficient basis for the imposition of civil money penalties."

(ALJRD, p. 16, second full paragraph.)

Respondent also takes exception to related FOF Nos. 298-302, inclusive.

SUPPORTING EVIDENCE AND ARGUMENT

Respondent conclusively established at trial, and the Court agreed in its Recommended Decision, that it was legally impossible for the Bank to obtain updated financial information on most borrowers, that the OCC stipulated that literal compliance with Article XIII would not be required, and that to have demanded updated financial information on certain "precarious loans", would have threatened the very collectability of those loans.

Under these circumstances, to conclude that Respondent's decision not to threaten the collectability of these "precarious loans" by demanding updated financial information to which the Bank was legally not entitled nevertheless is sufficient basis to assess a civil money penalty against Respondent is to stand the regulatory process on its head. In essence, the OCC has issued a consent order and insisted upon literal compliance with it, not withstanding the conceded fact that such literal compliance would in fact be far more damaging to the Bank than compliance.

CONCLUSION

Based on the foregoing exceptions, supporting evidence and argument, Respondent respectfully takes exception to the Court's Conclusions of Law Nos. 4-9, inclusive.

DATED: March 6, 1995 Respectfully submitted,

/s/ Michael W. McCann
CAPPELLO & McCANN
Attorneys for Respondent

DECLARATION OF MICHAEL W. McCANN

I, MICHAEL W. McCANN, declare under penalty of perjury as follows:

1. I am a partner in the law firm of CAPPELLO & McCANN, attorneys for Respondent herein. I have personal knowledge of the facts stated herein and can competently testify thereto if called upon to do so.

2. Attached hereto as Exhibit 1 are true and correct copies of page 467 (face page), page 573-578, and page 708 (Certificate of Deposition Officer) from Volume III of the deposition of John F. Henning, Jr. taken on November 16, 1994 in San Francisco Superior Court Case No. 950665.

3. I also represent Respondent William C. Sarsfield in San Francisco Court Case No. 950665.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed at Santa Barbara, California, on March 6, 1995.

/s/ Michael W. McCann

[Filed Mar. 6, 1995]

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER OF THE CURRENCY

AA-EC-93-144

IN THE MATTER OF
WILLIAM S. SARSFIELD, Former Chairman and Current Director,
SEQUOIA NATIONAL BANK, San Francisco, California

OFFICE OF THE COMPTROLLER OF THE CURRENCY'S EXCEPTIONS TOTHE RECOMMENDED DECISION AND ORDER OF THE ADMINISTRATIVE LAW JUDGE

OCC'S EXCEPTIONS TO THE ALJ'S RECOMMENDED DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER

These exceptions are filed pursuant to the Office of the Comptroller of the Currency's ("OCC") Rules of Practice and Procedure, 12 C.F.R. § 19.39. The Recommended Decision, Findings of Fact, Conclusions of Law and Proposed Order ("Opinion") in this case were served by personal service upon the OCC on February 3, 1995. The OCC concurs with the findings of Administrative Law Judge ("ALJ") Arthur L. Shipe in the majority of his Opinion. However, the OCC respectfully excepts to certain Findings of Fact, to ALJ Shipe's failure to find noncompliance with two Articles of the

Consent Order, his characterization of certain violations as merely "technical," his finding that the Respondent exercised good faith, and to the issuance of a Proposed Order recommending a Civil Money Penalty total lower than the penalty amount assessed in the Notice of Assessment.

I. RESPONDENT MADE ONLY A SUPERFICIAL EFFORT AT COMPLIANCE

This action concerns noncompliance by Chairman of the Board William C. Sarsfield ("Respondent") with the March 1992 Consent Order ("Order") placed by the OCC upon Sequoia National Bank, San Francisco, California ("Bank"). The ALJ has found Respondent's violations of Articles VI, VII, IX, XII and XIII of the Order to not be "flagrant" or "intentional," and has found that "substantial effort was undertaken to comply with the OCC mandates." (Opinion 18). He has also found "good faith" on the part of the Respondent. (Opinion 19). The OCC respectfully excepts from the ALJ's findings that Respondent exercised good faith or made a substantial effort to comply with these Articles of the Order. As the OCC has demonstrated through testimonial and documentary evidence, Respondent's attempts to comply with the Order were merely superficial.

In his Opinion, the ALJ emphasizes the existence of a split between the two factions on the Bank's Board of Directors,[1] and accordingly has not given great weight to the testimony of former minority faction Directors Henning and Bolles. In contrast, the ALJ does credit the testimony of, and nowhere casts doubt on the credibility

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[1] Respondent was a member of the majority faction, which had the ability to outvote the minority faction. (Opinion 23).

or memory of, OCC National Bank Examiners Raymond Sander and Nicholas Ragus. Yet, in spite of this apparent respect for the testimony of Sander and Ragus, the ALJ has overlooked portions of the record containing information and statements of these examiners which tend to show that Respondent's failure to comply with the Order was egregious, and his efforts merely superficial.

A. Articles VI and VII: Liquidity and Volatile Liabilities

The OCC concurs with the ALJ's finding that Respondent violated Articles VI and VII of the Order. However, the OCC excepts to the ALJ's finding that Respondent made a "substantial effort" (Opinion 18) to comply, and exercised "good faith" in that effort. (Opinion 19). The record is clear that Respondent's efforts to comply with these Articles were merely superficial, and that his failure to take remedial action was so widespread and so dangerous to the safety and soundness of the Bank as to constitute a display of bad faith on his part.

In spite of multiple previous citations noted in the record (Opinion 24-26, 28; OCC exhibit 1, p.3; OCC exhibit 2, ppg.1-2; OCC exhibit 4, ppg. 5-6; OCC exhibit 5, ppg. 3-4; Sander TR 34), during the period of the Order Respondent failed to implement action to increase core deposits and reduce the Bank's percentage of volatile liabilities. Sequoia's percentage of volatile deposits was 72% at the December 31, 1992 examination, unchanged from the Bank's previous examination. (OCC exhibit 45, p.1; OCC exhibit 47; OCC exhibit 48; OCC exhibit 51; OCC exhibit 52; Sander TR 72-77). At the December 31, 1992 examination, Sequoia's core deposits were under 20%, while its peer group was at 80%. (Sander TR 78-79; OCC exhibit 53, p.9) .

During this entire time, Respondent's Consent Order responses failed to address the central theme of the Bank's reliance on volatile liabilities as a percentage of total deposits. (Sander TR 721; Sarsfield exhibit 5).

The Respondent has claimed that he had a plan to reduce volatile liabilities, which consisted of selling assets. (Sarsfield exhibit 37; Sarsfield TR 291-292). This simplistic approach could not properly be considered a plan at all, since it failed to take into account such basic needs as a statement of how and to whom the Bank would sell these assets. (Sarsfield exhibit 37). However, such details should have been addressed because, as of December 31, 1992, Sequoia had planned for over six months to sell home equity loans of $11 million to reduce dependence on volatile liabilities, but failed to consummate the plan because the files needed extensive work to be made saleable, and because the equity lines were earning assets. (OCC exhibit 45, p.2).

In his Opinion, the ALJ does not appear to give sufficient weight to evidence that, even if implemented, Respondent's 1992 plan would not have complied with the Order and that, in any case, Respondent made little effort to implement it. For example, Examiner Sander testified that he doubted that Respondent's 1992 plan would have met the requirements of the Order, and that Respondent made no effort to implement his plan. (Sander TR 743; OCC BR 24). In actuality, the Respondent did fail to implement even his rudimentary idea to sell assets (OCC exhibit 156, p.8), and the Bank's volatile liability percentage failed to substantially decrease by December 31, 1992. (OCC exhibit 45, p.1; OCC exhibit 47; OCC exhibit 48; OCC exhibit 51; OCC exhibit 52; Sander TR 72-77). There can be no

finding of good faith in such deficient actions and glaring omissions.

Sequoia also had a tremendous amount of interest rate risk as a result of its reliance on volatile liabilities. (Sander TR 78; OCC exhibit 53). Yet, in spite of the danger noted by Examiner Sander, the Respondent failed to take interest rate risk into account at all in his responses to the Consent Order. (Sander TR 722-723; 731). Again, it is inconceivable that Respondent could be seen as acting in good faith when a key aspect of liquidity such as interest rate risk is summarily ignored in Respondent's compliance packets.

The process of managing a bank's assets and liabilities to maximize net interest income and maintain performance, while maintaining adequate liquidity is called funds management. (Sander TR 722). To do this properly, one needs to have an Asset and Liability Management Policy. (Sander TR 82). However, as of December 31, 1992, Sequoia had no active funds management direction other than to cover running-off time deposits with new time certificates of deposit from the money desk, and to meet its cash letter. (OCC exhibit 44). The Bank's funds management policy was considered liberal, yet the Bank failed to adhere to the guidelines of even this liberal policy, (OCC exhibit 44; OCC exhibit 45; OCC exhibit 62; OCC exhibit 63, Sander TR 81-82, 89) leading Examiner Sander to conclude that Sequoia suffered from the most unsuccessful attempt at funds management that he had ever seen. (Sander TR 722-723) .

Respondent has nevertheless claimed that he proposed an asset and liability management policy to the Board, but the document that he produced as his "policy" was reviewed by Examiner Sander and found not to represent such a policy, because it lacked a liquidity standard to comply with, a level of interest rate risk that the Bank

would be willing to assume, information on how management would make liquidity decisions, information on who would do the liquidity reporting, information on balance sheet composition, and information on determining the impact of the Bank's ratio of rate sensitive assets to rate sensitive liabilities. (OCC BR 30; Sander TR 725-727; Sarsfield exhibit 39).

However, in spite of the credible testimony of Examiner Sander, the ALJ appears to have overlooked the fact that Respondent's proposed policy was grossly inadequate. Yet, the inadequacy of this policy goes right to the heart of the matter concerning Respondent's lack of a substantial effort to comply with, in this case, Articles VI and VII of the Order. A policy so replete with omissions does not represent a substantial effort to comply, and cannot and does not represent a good faith effort on Respondent's part.

Respondent even actively opposed an independent consultant who recommended an approach similar to the OCC's. (OCC exhibit 29; OCC exhibit 30). Sequoia hired consultant Jeanine Catalano of the Secura Group, to review the Bank's liquidity and volatile liability positions, and to make recommendations. (Sander TR 86-87). Catalano produced a report, first communicated to the Board in August 1992 (Sander TR 87; OCC exhibit 21) and confirming many of the OCC's findings, which concluded that the Bank's liquidity position was of serious concern, with a particular problem centering on out-of-area deposits. (OCC exhibit 23; OCC exhibit 62). Catalano concluded that the Bank's poor liquidity position exposed it to the risk of being unable to meet unanticipated cash flow needs, and recommended that the Bank update its funds management policy. (OCC exhibit 62). However, the Bank subsequently failed to update that policy. (Sander

TR 87-88). Catalano also recommended that the Bank develop a contingency plan for liquidity, in light of the ease with which its brokered and out-of-area deposits could be pulled from the Bank. (OCC exhibit 28). The Bank failed to develop this plan as well. (Sander TR 89; 741-742). Catalano also noted that she expected Sequoia to sell and or collect a package of loans and use the proceeds to reduce volatile liabilities. (OCC exhibit 62). The Bank also failed to do this. (Sander TR 88).

In the opinion of both the OCC and independent consultant Catalano, Respondent's "efforts" to comply with the Order were superficial and inadequate, omitting entire necessary areas of analysis, such as interest rate risk and a liquidity contingency plan. This shows the utter lack of good faith on the Respondent's part, a lack of good faith which is compounded when one also considers that the Bank had been cited for its liquidity failings at many previous examinations as well.

B. Article IX: Loan Policy

Although the OCC concurs with the ALJ's finding that Respondent violated Article IX of the Order, the OCC excepts to the ALJ's finding that Respondent made a "substantial effort" (Opinion 18) to comply, and exercised "good faith" in that effort. (Opinion 19) .

The OCC concurs with the ALJ's finding that Respondent's loan policy violated Article IX because it was not approved by the Board of Directors, had no requirement for updated financial information for problem loans, or for equity line annual reviews, had no loan-to-value guidelines for commercial loans, land loans or standby letters of credit, had no linking of maturities with repayment source, had inadequate guidelines for loan distribution, had

unreasonable maximum limits for loan types, had no limit for land loans and no concentration limits for land loans, had no requirements for documentation of the specific purpose of loans, and no statement of who is responsible for compliance with the policy, called for annual instead of quarterly loan reviews, did not have the new BB 91-19 definition of "in process of collection," had a charge-off guideline of "principal and interest past due six months" instead of "principal and/or interest past due six months," had no loan administration program to correct identified weakness, and had no insider loan limit specifics. (Opinion 59-61; OCC exhibit 153; OCC exhibit 64; OCC exhibit 12).

In defense to these facts, Respondent has made an unsupported argument that the reason why the Bank's loan policy was not adequately revised as of December 31, 1992, was because the OCC had accepted an early draft as sufficient. Respondent's explanation is completely without support in the record, and serves to demonstrate the utter lack of good faith on his part.

It is clearly important for any bank to have an adequate loan policy, to guide it in its determinations of how to allocate its resources. It is especially important for a problem bank such as Sequoia to have a policy to guide it in these decisions. A problem bank, by its very nature has to exercise care to make sound loan decisions, so as to not put its unusually limited resources to unnecessary risk. Despite Sequoia's status as a bank in imminent danger of failure (Opinion 34; OCC exhibit 12, p.2), and despite the many deficiencies noted in the Bank's loan policy, Respondent failed to adequately revise that policy. The ALJ concluded that the OCC made very clear that it reserved the right to comment on Respondent's initial draft, and that the June 30,

1992 examination set out in detail the OCC's concerns. (Opinion 10). Respondent's failure to make the wholesale changes required in the policy by December 31, 1992 demonstrates his lack of good faith, and cannot be seen to represent a substantial effort.

C. Article XII: Allowance for Loan and Lease Losses

Additionally, despite finding that the Respondent failed to comply with Article XII of the Order, which concerns the Bank's Allowance for Loan and Lease Losses ("ALLL") methodology, and despite finding no reason to doubt the reasonableness or credibility of Examiner Nicholas Ragus, the ALJ appears to give little weight to Mr. Ragus' observations that in a well-run bank, the bank is supposed to identify loan losses before the regulators do (OCC BR 54; Ragus TR 765), and that if a bank is continually directed by the OCC to take loan charge-offs, even if they're cooperative in doing so, that bank does not have an adequate ALLL function because its loan grading is deficient. (OCC BR 54; Ragus TR 765). Despite being cited for a faulty ALLL methodology in five Reports of Examination, the Bank still failed to satisfactorily explain its ALLL methodology. (Opinion 13). This further demonstrates the egregious nature of Respondent's violation of Article XII.

Although some of the requirements of the Order may seem technical from the perspective of a sound bank, it is important to remember that Sequoia was not a sound bank. The Order was designed to bring the Bank back to a safe and sound condition, if its provisions were observed. The Respondent failed to comply with those provisions, which allowed a Bank in poor condition to remain in poor condition, literally on the brink of failure. (Opinion 34; OCC exhibit 12, p.2). Clearly, the violation of Article XII was substantial,

not merely technical, in that the Bank's lack of a proper ALLL methodology continued for years despite OCC citations, and ultimately led in 1992 to ALLL shortfalls corrected only by the OCC at examinations. (Opinion 79; Ragus TR 756-757).

D. Article XIII: Credit and Collateral Exceptions

Although he found that Respondent violated Article XIII of the Order, the ALJ erred in his characterization of Respondent's failure to comply with Article XIII of the Order as "technical." (Opinion 16). The ALJ overlooked a great deal of uncontroverted evidence in the record, showing that the noncompliance with Article XIII was not merely technical.

Approximately 75% of the loans reviewed during the December 31, 1992 examination had exceptions. (Opinion 80; Ragus TR 211; OCC exhibit 43, p.16; OCC exhibit 139). It is important in any bank to have complete loan files, so that a proper analysis may be made of expected repayment sources, and to monitor the credit after funds are extended. (Opinion 82; Ragus TR 215). It is particularly important to have complete loan files in a problem bank such as Sequoia, where the Bank's condition was so precarious that the default of a few large credits could have crippled the Bank or rendered it insolvent.

There are many specific examples of inadequate files at the Bank. For example, the loan report for the California Properties loan, which was eventually charged off as a $282,000 loss, had a financial analysis exception and an inadequate repayment source analysis. (OCC BR 55; Ragus TR 211; OCC exhibit 139). Similarly, the loan report for the loan to Borrower M did not note the repayment source, the financial statement analysis did not balance to the borrower's financial statement,

the borrower's financial statement did not list all debt, and the loan summary did not contain an adequate cash flow analysis. (OCC BR 55; Ragus TR 211; OCC exhibit 139). The loan report for the $375,000 loan to Borrower L had a stale financial statement (OCC BR 55; Ragus TR 212; OCC exhibit 139), and the loan report for the $302,000 loan to Director Krug had no cash flow analysis, and no financial statement for the borrower's son-in-law, even though he was the expected repayment source. (OCC BR 56; Ragus TR 212; OCC exhibit 139). The loan extension report for the $545,000 loan to Borrower DR also did not contain an adequate cash flow analysis. (OCC BR 56; Ragus TR 213; OCC exhibit 139) .

Director Henning has testified that he considered Sequoia's loan files to be a "disgrace," with missing documentation and no set procedure, and with no real attempt to clean the files or get all of the documentation until late December 1992. By the end of the year, however, this had not been accomplished. (Henning TR 777) .

Not only did Respondent fail to maintain updated files on old loans, but he also failed to obtain information on new loans at the time they were made, even after he consented to issuance of the Order. As the ALJ has noted in his Findings of Fact, four new loans with inadequate cash flow analysis were made after the Order was signed. (Opinion 81; Ragus TR 214-215; OCC exhibit 139). Files with an inadequate cash flow analysis or files with inadequate repayment source analysis are fundamentally incomplete at the outset, and can easily lead to a situation where a bank lends substantial amounts to borrowers unable to make payments. This violation is substantial, not merely technical, as no reasonable explanation is given in the record to justify the Bank's documentation failures on an ongoing basis.

II. RESPONDENT FAILED TO COMPLY WITH ARTICLE X OF THE ORDER

The OCC respectfully excepts from the ALJ's finding that Respondent complied with Article X of the Order. Specifically, the ALJ erred by giving substantial weight to Respondent's evidence of subsequent repayment of certain loans downgraded by the OCC's examiners, using this as a basis to find that the Bank's loan review program was not so inadequate as to warrant a citation for noncompliance with the Order.[2] (Opinion 12, 70).

The ALJ correctly recognizes the deference afforded National Bank Examiners in the area of loan classification.[3] (Opinion 70).

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[2] Throughout the hearing, Respondent's counsel introduced evidence, over the OCC's objection, of the disposition of several of the loans criticized by the OCC. Such testimony is irrelevant to the examiners' loan classification since the testimony involves events subsequent to the examiners' determination of risk.

[3] Courts have traditionally accorded great deference to the findings and conclusions of Federal bank examiners, given their expertise and the highly technical nature of the subject matter involved. "Unless shown to be arbitrary or capricious, or outside a zone of reasonableness, the ALJ, the [Federal banking agency adjudicatory decision-maker], and the courts must give significant deference to these experts." Sunshine State Bank v. Federal Deposit Insurance Corporation, 783 F.2d 1580, 1584 (11th Cir.

However, the ALJ failed to credit the proposition that the deference afforded examiners' judgments on the risks inherent in a bank's assets and liabilities is not diminished by events which occur subsequent to that determination. The Comptroller has specifically ruled that:

> [f]acts occurring after the classification of a loan have no bearing on the deference accorded the examiner in making the original classification. The examiner's classification and other similar risk assessments involving the exercise of predictive judgment cannot by their nature be measured by subsequent events. The examiner can only determine, based on his experience and training, that a loan does not satisfy accepted standards of prudent banking operations. The fact that, for example, a loan is ultimately paid off does not affect the validity of the examiner's determination which provides the basis for subsequent actions by the OCC and the bank.

In the Matter of Lakeside National Bank of Lake Charles, Lake Charles, Louisiana, No. AA-SW-90-165, 11-12, (May 8, 1992).[4] Under the rule

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1986)

[4] See also, Bank of Dixie v. Federal Deposit Insurance Corporation, 766 F.2d 175, 178 (5th Cir. 1985), for the proposition that evidence of corrective measures taken after the issuance of an order constitutes no defense to the issuance of that

of this precedential decision, subsequent repayment is irrelevant, and the ALJ should not have taken into account, over the OCC's objections, the ultimate disposition of the loans in question.

The ALJ has also erred in finding that Respondent made a good faith effort at proper loan review, an error which becomes apparent when one reviews the entire record. Regardless of the weight given to the evidence of subsequent loan repayment, it is clear that

Respondent failed to implement an adequate loan review as required by the Order.

At the hearing, Examiner Ragus testified that the main element of an effective loan review program is that it accurately grades the loans in the bank's portfolio in order to identify problem loans and to determine the amount of credit risk and loss potential in the portfolio. (Ragus TR 177). The record demonstrates that the Bank had failed to perform this function for years prior to the issuance of the Order. The Bank had first been cited at February 28, 1989 examination for needing improvement in its loan portfolio supervision. (OCC exhibit 1, ppg.1-2) . These concerns were not addressed at that time, because the Bank was again cited at its March 31, 1990 examination, for an upward trend in problem loans. (Sander TR 35; OCC exhibit 2, ppg.1 and 3; OCC exhibit 2, p.2 of June 12, 1990 letter to Board). Still, no improvement occurred, because the July 31, 1991 examination of Sequoia noted that the Bank still had ineffective loan portfolio supervision, including liberal underwriting, an inability to detect problem loans, and a failure

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order.

to ensure insider legal compliance. (OCC exhibit 4, p.9) .

As evidenced by the findings at the December 31, 1992 examination, and in keeping with this historical pattern, the Bank's loan review program still completely failed to properly grade and identify problem loans at that time. At the December 31, 1992 examination, the OCC's examiners downgraded 10 of the 41 loans that were reviewed, 21% of the entire loan sample, totaling $2,565,000. (Ragus TR 179; OCC exhibit 127) .

The Respondent has repeatedly noted that many of the OCC's downgraded loans eventually paid off. However, it is instructive that the two loans examined in 1992 that became eventual losses were so huge, totalling over $700,000, that they completely wiped out the Bank's ALLL. (Ragus TR 756) .

In addition, these loans had such glaring weaknesses that it is hard to imagine how they could have been graded anything other than loss. For example, at the time of the December 31, 1992 examination, the Bank had internally classified the $282,000 loan to California Properties as doubtful. (OCC exhibit 128). However, the California Properties loan had such severe weaknesses that it could not be considered a bankable asset. (Ragus TR 182). The loan was an insider-related credit whose source of repayment was cash flow from the Hotel Californian. (Ragus TR 180; OCC exhibit 82). Not only was the cash flow from the hotel considered insufficient to service the debt, but the borrower was severely delinquent on the first deed of trust and real estate taxes, city taxes, payroll taxes, and the ground lease. (Ragus TR 181; OCC exhibit 43, ppg.25-26; OCC exhibit 82). At the time of the December 31, 1992 examination, the loan was on nonaccrual and the Bank's only security was in the hotel's furniture, fixtures and equipment.

(Ragus TR 180-181; OCC exhibit 43, ppg.25-26; OCC exhibit 82). The guarantor, Bank Director Norman Krug, provided no financial support for the credit. (Ragus TR 184; OCC exhibit 43, ppg.25-26; OCC exhibit 82).

The OCC's examiners properly classified the California Properties loan as a loss. (Ragus TR 182; OCC exhibit 43, p.23; OCC exhibit 129). The Bank did not disagree with the OCC's classification and charged off the credit in its entirety. (Ragus TR 184-185; OCC exhibit 152).

Another example of the Bank's failure to achieve adequate classification is the $86,500 loan to Borrower M. At the time of the December 31, 19[illegible] examination, the Bank did not internally classify the Borrower M loan, rating it as "pass." (Ragus TR 187; OCC exhibit 128). The source of repayment for this loan was supposed to be construction financing to be obtained from another institution. (Ragus TR 186; OCC exhibit 108). However, the loan file contained no analysis of the borrower's ability to obtain a construction loan and the borrower provided no other support for the credit. (Ragus TR 187; OCC exhibit 108). The OCC's examiners properly downgraded this loan to substandard. (Ragus TR 187; OCC exhibit 43, p.24; OCC exhibit 129).

A third example is the $376,000 loan to Borrower L. At the time of the December 31, 1992 examination, the Bank internally classified the Borrower L loan as OAEM. (Ragus TR 192; OCC exhibit 128). However, this loan also had weaknesses that warranted a more severe classification. The Borrower L loan was delinquent and on nonaccrual, and the Bank was forced to file a notice of default in order to effect payment. (Ragus TR 192; OCC exhibit 101). For these reasons, both the OCC's examiners and the Bank's own consultant

downgraded the loan to substandard. (Ragus TR 192-193; OCC exhibit 43, p.23; OCC exhibit 120; OCC exhibit 129).

In addition to these credits, the OCC's examiners also properly downgraded the following loans:

Borrower	Loan Amount	Bank Rating	OCC
Borrower F/ Borrower O	$194,000/ $164,000	OAEM	Substandard
Borrower E	$263,000	Pass	Substandard
Borrower B	$150,000	Pass	Substandard
Borrower PL	$100,000	Pass	OAEM
Borrower P	$450,000	OAEM	Substandard
Borrower G	$400,000	Pass	OAEM
Borrower K Trust	$100,000	Pass	OAEM

(OCC exhibit 43, ppg.23-24; OCC exhibit 128; OCC exhibit 129).

In sum, the Bank's loan review program failed to do the one thing that it was supposed to do: it did not accurately grade the Bank's loans. (Ragus TR 188; OCC exhibit 43, p.16; OCC exhibit 74). Therefore, it was not an effective program and it failed to comply with Article X of the Consent Order[5]. (Ragus TR 197; OCC exhibit 43, p.16;

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[5] Additionally, the ALJ has noted that the Bank hired an outside consultant, Roger Cabell of JRC Associates, to examine

OCC exhibit 74) .

It should also be noted that the ALJ found that many of the Bank's problem loan reports, including the California Properties loan, lacked purpose and repayment source information, proper cash flow analysis, adequate action plans, and timeframes[6]. (Opinion 68; Ragus

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loan portfolio procedures, and has found that Cabell noted that the Bank's loan expectations and ratio of classified assets was twice as much as the Bank's peer group. (Opinion 67). Cabell reviewed 38 loans in his December 1992 review, including 15 that were previously reviewed. (Opinion 67).

[6] Article X of the Order required that problem loan reports be filed with the Board on a quarterly basis, with monthly updates. (Ragus TR 176-177; OCC exhibit 8, ppg. 15-16). However, the Bank failed to comply with this requirement as well. Many of the reports that were filed lacked purpose and repayment source information, proper cash flow analysis, adequate action plans, and timeframes. (Ragus TR 194; OCC exhibit 121). They lacked events that would trigger an upgrade or a downgrade in the credit and sufficient support for the allowance for the loan and lease loss ("ALLL") allocations for the problem loans. (Ragus TR 194; OCC exhibit 121). And some of the reports contained stale financial information and inadequate analysis of financial information. (Ragus TR 194; OCC exhibit 121). For example, the report for the Borrower L loan lacked an adequate cash flow

TR 195; OCC exhibit 121). Many such reports also lacked events that would trigger an upgrade or a downgrade in the credit and sufficient support for the ALLL allocations for the problem loans. (Opinion 68; Ragus TR 194; OCC exhibit 121).

Between the faulty grading of its problem loans, two of which ended up wiping out the Bank's entire ALLL, and the Respondent's failure to prepare adequate problem loan reports, it is clear that the Bank's entire system for monitoring its loan portfolio was inadequate and flawed. There was far more wrong with the Bank in this area than mere subjective grades of classified loans, and the problems in this area had persisted for years. When one examines the entire record of Respondent's failures in the area of loan portfolio review, it is readily apparent that the ALJ has erred in characterizing this as mere subjective differences between the OCC and Bank on a few loan classifications.

III. RESPONDENT FAILED TO COMPLY WITH ARTICLE XV OF THE ORDER

In determining compliance with Article XV of the Consent Order, the ALJ erred in failing to take into account the several prior warnings, including the warning at the June 30, 1992 examination, that the OCC had provided to the Respondent on the issue of the

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analysis, failed to explain or support the ALLL allocation and contained stale financial information. (Ragus TR 194; OCC exhibit 121). And, a problem loan report for the Borrower M loan was never submitted because the Bank rated it a pass. (Ragus TR 195; OCC exhibit 121).

valuation of one component of the Bank's capital account, its Excess Servicing Fee Receivables ("ESFRs") . (OCC exhibit 12; Sander TR 731-732; Henning TR 782-984) . In the absence of a proper valuation for the ESFRs, the Respondent was on notice that the OCC might require the Bank to charge off their booked value. Consequently, the OCC's direction to charge off these assets after the December 31, 1992 examination was not a surprise to the Bank or the Respondent.

The ALJ has, in his decision, accepted the proposition that Respondent was on notice (Opinion 38-39), but inconsistently and erroneously omits this from his analysis and determination of whether or not there was compliance with the Order. (Opinion 16-17). Consequently, when they are included in the analysis, the prior warnings about the threat to the Bank's capital demonstrate that Respondent may, and should, be held responsible for the Bank's inadequate capitalization as of December 31, 1992. In fact, it is likely that the Bank was inadequately capitalized for purposes of the Order for a long period of time prior to December 31, 1992. There is no way of knowing if it was or was not, specifically because Respondent failed to secure justification for the valuation of the ESFRs.

The ALJ also finds, on page 83 of the Opinion, that the Bank cured its tier-one capital shortfall in May 1993. The OCC respectfully excepts to this Finding of Fact on the grounds that subsequent remedial actions are not relevant to the issue of compliance with the Order as of December 31, 1992. The OCC made a timely objection to such evidence on the record, and was overruled by the ALJ. Just as subsequent disposition of an asset should not affect the classification of that asset at a point in time, subsequent increases in the capital account should not affect the validity of a

finding that the Bank's tier-one capital was less than 8% as of December 31, 1992. See Lakeside, 11-12.

IV. RESPONDENT SHOULD BE ORDERED TO PAY A CIVIL MONEY PENALTY OF $15,000

The ALJ has accepted the OCC's evidence concerning the long evidence of problems at the Bank with regard to liquidity, volatile liabilities, problem loans and ALLL methodology. (Opinion 23-30). It is clear from the record that several years of OCC criticism elapsed before the Order came into being. The problems underlying the Order were not new ones for the Bank or the Respondent, yet by December 31, 1992, the Bank and the Respondent had still failed to comply with the Order. The significance of this failure to comply was magnified by the Bank's exceedingly poor condition, on the brink of failure with a CAMEL rating of "5." (Opinion 34; OCC exhibit 12, p. 2).

The Respondent was a member of the majority faction on the Board, with the ability to outvote the minority faction. Despite his claim that noncompliance with the Order was the result of an effort by a minority group of directors (Sarsfield BR 3), Respondent has offered no evidence to show how, if at all, the minority succeeded in thwarting the will of the majority. Yet, when December 31, 1992 came, Respondent's majority had still not effected compliance with the Order.

The areas of noncompliance are not mere technical requirements that the OCC arbitrarily imposed on the Bank. Rather, they went to the heart of the Bank's safety and soundness, and were only imposed with the consent of the Bank's board of directors, including Respondent. Reducing volatile liability dependence,

maintaining adequate liquidity, developing a satisfactory loan policy, establishing an adequate ALLL methodology, obtaining complete financial information on borrowers, and maintaining sufficient capital levels are bedrock principles of safety and soundness. Viewed in this light, the OCC did not ask Sequoia to do anything that a well-run bank should not already have been doing. But, Sequoia was not a well-run bank. At the time of the December 31, 1992 examination, it was a 5-rated institution beset by severe liquidity and asset quality problems, whose very survival was hanging in the balance. Despite the Bank's perilous condition, and his pledge to comply with the requirements of the Order, Respondent treated compliance with the document as nothing more than a paper-shuffling exercise.

The size of Respondent's financial resources are not at issue in this action, since Respondent has stipulated to his ability to pay the entire assessment at one time. (Joint exhibit 1). And, for violation of even one Article of a Consent Order for an eight month (240 day) period, the OCC has the authority to assess a first tier civil money penalty of $1,200,000. In finding in favor of the Respondent on two of the seven Articles of the Order, which for the reasons stated above the OCC respectfully excepts to, the ALJ has reduced the Recommended penalty to $10,000. The OCC chose to assess Respondent a penalty in the amount of $15,000, because it was believed after careful weighing of the issues involved, that this would be an appropriate amount to effectuate supervisory policy. In light of the agency's considerable penalty authority, and in light of the continuing nature of the Bank's problems for years leading up to the assessment, the OCC continues to believe that $15,000 is both fair and justified.

V. Conclusion

The Comptroller should order Respondent to pay a civil money penalty in the amount of $15,000.

Date: March 6, 1995

Respectfully submitted,

/s/ Michael Bloise
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